IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6777

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

GARY KEITH STEAGALD,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT IN FORMA PAUPERIS

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Gary Keith Steagald

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Gary Keith Steagald, respectfully prays for leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of the Supreme Court of the United States. This motion is made pursuant to 28 U.S.C. §1915 and 18 U.S.C. §3006A(d)(6).

In support of this motion, Petitioner shows the following:

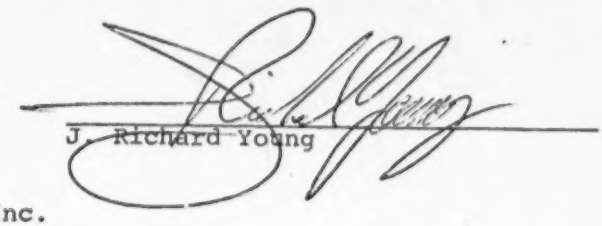
(1) Petitioner is a person for whom counsel was appointed in this case by the United States Magistrate for the Northern District of Georgia pursuant to 18 U.S.C. §3006A;

(2) Petitioner is a person for whom counsel was appointed in this case by the United States District Court for the Northern District of Georgia to pursue an appeal to the Fifth Circuit Court of Appeals pursuant to 18 U.S.C. §3006A; and

(3) Petitioner remains indigent and has advised counsel in writing, pursuant to Local Rule 7 of the Fifth

Circuit Court of Appeals, of his desire that a Petition for Writ of Certiorari be filed.

Respectfully Submitted,



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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
IN FORMA PAUPERIS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-titled case on April 14, 1980.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as United States v. Gaultney, No. 78-5329, and United States v. Steagald, No. 78-5416, 606 F.2d 540 (5th Cir. 1979), petition for panel rehearing granted in part and denied in part, petition for rehearing en banc denied, 615 F.2d 642 (5th Cir. 1980), as set out as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1980. On May 13, 1980, Mr. Justice Powell signed an Order granting until June 13, 1980 an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Fourth Amendment to the United States Constitution requires law enforcement officers armed with an arrest warrant, but in the absence of exigent circumstances, to obtain a search warrant to enter the premises of a third party, not named in the arrest warrant.

II. Whether, assuming arguendo that the Fifth Circuit opinion in United States v. Cravero, 545 F.2d 406 (1976), enunciates good law in regard to the requirements of the Fourth Amendment, the warrantless entry into the premises involved in the instant case was made without sufficient probable cause to justify the intrusion?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this case is the Fourth Amendment to the Constitution of the United States, as set out in Appendix "B".

RULES INVOLVED

Additionally involved in this case, by implication, are Rules 4 and 41 of the Federal Rules of Criminal Procedure, as set out in Appendix "C".

STATEMENT OF THE CASE

This criminal action was brought under a three count indictment (the Petitioner being named in Counts One and Two only) charging the Petitioner with possession with intent to distribute a quantity of cocaine (a Scheduled II controlled substance), in violation of 21 United States Code 841(a)(1) in Count One, and conspiracy to violate 21 United States Code 841(a)(1) in violation of 21 United States Code 846 in Count Two. Also charged in Counts One and Two were Cathy Gaultney, Hoyt Gaultney and James Albert Smith. Additionally, Hoyt Gaultney was charged in the same indictment with importation of the same cocaine in violation of 21 United States Code 952(a) in Count Three (R. 1-3).

Hoyt Gaultney was convicted following a jury trial before the Honorable Charles A. Moye, United States District Court Judge for the Northern District of Georgia, on all three counts in a separate and previous trial. His conviction was affirmed in United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979), Petition for Panel Rehearing granted in part and denied in part, 615 F.2d 642 (5th Cir. 1980). Cathy Gaultney and James Albert Smith were tried subsequently with Petitioner, and each of them prevailed on Motions for Judgement of Acquittal at the close of the government's case in chief. (Tr. 276). Petitioner's Motion for Judgment of Acquittal at the close of the government's case was denied (Tr. 276) and upon renewing his Motion at the close of all the evidence, the Court denied the Motion again (Tr. 282).

Finally, Petitioner filed a renewal of his Motion for Judgment of Acquittal following the jury's verdict of guilty on both counts (R. 100). On June 12, 1978 Petitioner's Renewal of his Motion for Judgment of Acquittal was denied by the court (R. 108).

On June 27, 1978 Petitioner was sentenced by Judge Moye to five years on Count One and five years on Count Two to be followed by a special parole term of three years, with the sentence in Count Two to run concurrently with the sentence in Count One (R. 112). And on the same date, Steagald filed his Notice of Appeal and the court granted his Motion to Proceed In Forma Pauperis on appeal. (R. 113).

Gaultney's and Petitioner's cases were appealed separately but were joined for oral argument and were jointly decided by a panel of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court citing the Fifth Circuit's opinion in United States v. Cravero, 545 F.2d 406, cert. den., 430 U.S. 983 (1976). Judge Kravitch dissented, saying that "Unlike Cravero the evidence linking the subject [of the arrest warrant] to the premises was extremely fragile and insufficient to justify an entry without a search warrant." On April 14, 1980, the same panel, in a per curium opinion, granted in part and denied in part the Petition for Panel Rehearing, and denied the Petition for Rehearing En Banc. 615 F.2d 642 (1980). Judge Kravitch again dissented on the issue of probable cause and continued that "The more important problem, however, is the extension of the rule announced in United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties." at 644.

STATEMENT OF FACTS

On January 4, 1978 Agent Joseph Rassey of the Drug Enforcement Administration was contacted by an individual who had provided him with information concerning drug cases in the past. This individual (hereafter referred to as C.I.) told

Agent Rassey that he might be able to locate Ricky Lyons, a federal fugitive, and a guy named "Jimmy" who he believed was a state fugitive. He further told Agent Rassey that Jimmy had some cocaine to sell (1st Supp. Vol. II, p. 43). Initially Agent Rassey was interested in the C.I. setting up the drug deal but subsequently he contacted Agent Kelley Goodowens in Savannah, Georgia and relayed the information he had obtained from the C.I.

On January 14, 1978, the C.I. called Rassey and said he had "received a phone call from Jimmy and that it was a number where Jimmy and Ricky were going to be within the next twenty-four hours" (1st Supp. Vol. II, p. 36). Rassey was unable to reach Goodowens that day and waited until Monday, January 16, 1978 to relay the phone number he had gotton to Goodowens. Rassey said that he spoke with the C.I. just prior to reaching Goodowens on the 16th and the C.I. told him the number was still good (1st Supp. Vol. II, p. 38). Rassey testified that he did not inquire to the C.I. as to what his basis was for concluding that Jimmy was calling from the particular number he had. Rassey accepted the C.I.'s conclusion because "he had always given me good information before. He said he knew they were there." (1st Supp. Vol. II, p. 50). The C.I. was unable to say from what location specifically Ricky Lyons or Jimmy were calling from or how long they would be there. Rassey testified that it was his impression "from what he said was that they were just going to be there for a while; they did not live there". (1st Supp. Vol. II, p. 47). The C.I. also told Rassey that there would be four or five people at the residence. When asked about the basis of his belief in this statement, the C.I. replied, "Well, I just know that there's you know, some people there" (1st Supp. Vol. II, p. 48). Rassey spoke with the C.I. several times by telephone on January 18, 1978 and relayed to Goodowens that the C.I. said the information was "still good" (1st Supp. Vol. II, p. 49).

On January 16, 1978 after Goodowens received a telephone number from Agent Rassey, he contacted Southern Bell's Security Division and obtained the address to the telephone number. He learned that the phone was listed in the name of Richard E. Fisher (1st Supp. Vol. I, p. 18-19). On January 18, 1978 after having difficulty locating the address, Goodowens contacted Southern Bell again and obtained detailed directions on how to get to the residence (1st Supp. Vol. I, p. 20). At no time on these days did Goodowens attempt to reach Mr. Fisher though he had determined that Mr. Fisher was located in the directory, along with another residence phone (1st Supp. Vol. I, p. 112).

On January 18, 1978, based on the information he obtained from Rassey, Goodowens decided to go to the Carey Court location in an attempt to find Lyons. Despite the fact that he was in the federal courthouse in Atlanta when he received the final call from Rassey, no search warrant was obtained (1st Supp. Vol. I, p. 79, 86-87). Goodowens testified that physically he could have obtained a search warrant, there was "no physical hindrance" (1st Supp. Vol. I, p. 87). Goodowens also had received information from Rassey that there would possibly be drugs at the residence (1st Supp. Vol. I, p. 39, 88). However, Gwinnett County Detective Fowler stated it a bit more strongly in his testimony when he testified that DE Agent Smith "had previously told me that he had information that there might be a quantity of marijuana at the location" (1st Supp. Vol. II, p. 107). And "to the best of my recollection I believe he stated 1500 pounds" (1st Supp. Vol. II, p. 108).

Agent Smith called in several other agents to accompany himself and Goodowens. None of the officers had any photographs of Lyons (1st Supp. Vol. I, p. 46) nor did they have a copy of the arrest warrant (1st Supp. Vol. I, p. 45, 46). Since none of the officers had ever even seen the arrest warrant (1st Supp.

Vol. I, p. 47), they apparently were relying on Goodowens' knowledge of the 18 month old indictment (1st Supp. Vol. I, p. 45). Only Agent Smith had testified that he knew Ricky Lyons by sight and he mistakenly thought that Gaultney was Lyons at their first encounter (1st Supp. Vol. II, p. 55).

Altogether there were nine or ten officers, some of whom had requested to come along, comprising the raid squad. All of the officers were in plain clothes and unmarked cars (1st Supp. Vol. I, p. 59). They conducted no surveillance of the residence, though they did drive by and notice that smoke was coming out of the chimney of one of the two houses at the Carey Court location (1st Supp. Vol. I, p. 61).

As the officers approached the house, guns drawn, two male individuals were seen standing at the rear of a Volkswagen. The individuals were Gaultney and Steagald. Gaultney was squatted down at the rear deck of the car. As Smith approached the car he "reached down and grabbed him and picked him up, or almost picked him up, and said 'Ricky'" (1st Supp. Vol. II, p. 55). In response to why he had done that, Smith testified "... at first I thought he was Ricky Lyons; it looked like him to me" (1st Supp. Vol. II, p. 55). When Agent Smith decided that this individual was not Lyons, he "turned him around and faced him toward the car" (1st Supp. Vol. II, p. 56). Both men were frisked right there in the driveway in plain view of the public road and identification was demanded of each of them.

Meanwhile, three other agents, including Agent Jim Williams, who arrived in a separate vehicle, headed for the A-frame(the second residence bearing the same address). These agents also approached this residence with their guns drawn. Agent Williams testified, "The purpose of going to the A-frame was the same as going to the house at the top of the hill. We didn't know which house that the individuals might have been at" (1st Supp. Vol. III, p. 17). When it became apparent that the other house was not occupied, Williams returned to the driveway

where Gaultney and Steagald were being detained. Williams testified that he thought he "left one officer down there" at the A-frame (1st Supp. Vol. III, p. 17).

After deciding that Gaultney was not Lyons, Agent Smith and another officer, Detective Conway, ran down to the house and demanded entry of Gaultney's wife, Cathy, who had come to the door (1st Supp. Vol. III, p. 51-55). Agent Smith testified that he was dressed in blue jeans with a badge clipped to the pocket of his denim shirt (1st Supp. Vol. II, p. 56); he also had his gun drawn. Agent Smith described himself as being 34 years old, six feet six and a half inches tall and weighint 270 pounds. He also testified that Mrs. Gaultney looked to be "about five foot four inches or five foot five inches, weigh[ing] less than 100 pounds, right at 100 pounds." He further stated that "the first time I saw her, frankly, I thought she was about 12 or 13" (1st Supp. Vol. II, p. 72). Smith told Mrs. Gaultney that he had a warrant for Ricky Lyons. She also correctly identified the two men outside as her husband and Gary Steagald and told Smith that she was "here by myself" (1st Supp. Vol. II, p. 77). Smith told her to "put her hands on the wall and don't move" (1st Supp. Vol. II, p. 77). Cathy Gaultney testified that Smith placed his gun in her back while she was faced to the wall (1st Supp. Vol. III, p. 56). Agent Smith then left her with Detective Conway guarding her while he searched the rest of the house. It was his testimony that she was not free to leave until "I got through searching the house. . . ." (1st Supp. Vol. II, p. 77).

As Agent Smith proceeded through the house, he went into the front bedroom and observed a small table with a set of scales and a bag of white powder on it (1st Supp. Vol. II, p. 60). Smith testified that there were two beds in the room and that he "looked under the first bed, looked over the second bed, checked it. . . ." (1st Supp. Vol. II, p. 60).

Smith left the front bedroom, checked the second bedroom and then returned to the main room and informed Detective Conway that he thought he had seen cocaine in the bedroom and that "We need to get our act together" (1st Supp. Vol. II, p. 62). Then he went outside and related this to the other agents. Goodowens suggested that Smith drive to Atlanta and assist in getting a search warrant for the house (1st Supp. Vol. II, p. 63-64).

Gaultney and Steagald were taken into the house. There is conflicting testimony as to when Gaultney was handcuffed. Petitioner testified that an officer, whom he described, handcuffed Gaultney outside the house and told Gaultney that there were "double locks on the handcuffs, so the more you move, the tighter they'll get. . ." (1st Supp. Vol. III, p. 41). Petitioner further testified that he did not recall "seeing the handcuffs off Gaultney the entire time" (1st Supp. Vol. III, p. 43). Agent Williams testified that Gaultney was not handcuffed until after Gaultney indicated a willingness to talk with him in the house (1st Supp. Vol. III, p. 66). He could not give a ready explanation as to why he handcuffed him at that point.

Petitioner was handcuffed as soon as he was taken into the house, after he had furnished the officers with all his identification. Agent Williams testified that he did not know why Steagald was being held in custody (1st Supp. Vol. III, p. 20).

Gaultney indicated to Williams that he wished to talk with him and was taken into the back bedroom. There is no dispute that Gaultney was handcuffed at this time. Agent Goodowens testified that he conducted a weapon search of the bedroom for Agent Williams' protection. This search involved looking around a small dressing table, opening drawers, and removing a closed suitcase from a closet shelf which he opened and saw what he believed to be packets of suspected cocaine (1st Supp. Vol. I, p. 37-38). Goodowens placed the suitcase at the other side of the room. At this point Agent Williams was alone with Gaultney.

During this time, Agent Smith had appeared before Magistrate Forrester in the hearing room at the Magistrate's Court and obtained a search warrant. There is some dispute as to the time of its issuance as Agent Smith does not believe that it was 8:00 p.m. when Judge Forrester signed the warrant as is so indicated on the warrant. Magistrate Forrester testified at the Motion to Suppress hearing that his recollection as to the time was not specific. There was a large wall clock in the room where the warrant was signed (1st Supp. Vol. II, p. 33). He did feel that it probably was earlier than 8:00 but he did admit that the authorization was his own handwriting and he filled in the time "8:00 p.m." (1st Supp. Vol. II, p. 25, 31-32). Agent Smith says he went immediately to a phone and called Agent Durrell at the house and relayed to him that a search warrant had been obtained. Agent Smith left the courthouse with the search warrant, stopped for something to eat and arrived back at the house after 9:00.

While Agent Smith was talking to Agent Durrell on the phone, James Smith and his wife drove up to the house. Upon entering the house both were met at gunpoint. Agent Goodowens stepped forward with a shotgun and advised he was a federal agent and ordered them both to put their hands on the wall (1st Supp. Vol. I, p. 10). Smith was searched, taken into custody, handcuffed and then taken into the living room with the other defendants. His wife, though no charges were made against her, was placed on the couch with the others. Goodowens testified that she would not have been allowed to leave (1st Supp. Vol. I, p. 108).

Agent Goodowens went to defendant Smith's truck and looked inside to see if there were any other persons in it. Determining that there were not, he returned inside (1st Supp. Vol. I, p. 108).

The search of the premises was continued before 8:00 p.m. some 10 to 15 minutes after the agents received word from

Agent Smith that the search warrant was in his possession. Subsequently several items were seized including another suitcase containing suspected cocaine (1st Supp. Vol. I, p. 93).

Agent Smith testified that he arrived back at the house sometime after 9:00 and about one-half hour to 45 minutes later he went out to Smith's Dodge truck and began searching it. He looked through papers and other items on the front floorboard and subsequently found a closed briefcase with a combination lock on it. Agent Smith took the case into the house and went through it (1st Supp. Vol. II, p. 93-94). During this time Defendant Smith was still handcuffed and being held inside the house. He did not consent to the search of the truck (1st Supp. Vol. II, p. 94). Agent Smith said he searched the vehicle to obtain evidence of Defendant Smith's identity (1st Supp. Vol. II, p. 69-70, 93-101, 109). Evidence taken from Smith's truck was suppressed by the district court below.

Each of the individuals with the exception of Smith's wife, was arrested and shortly thereafter indicted on charges relating to the cocaine seized in the search of the house. Additional warrants were later obtained for a warehouse in Gwinnett County and one in Fulton County and residences in DeKalb and Clayton Counties and various items seized. It is Appellant's contention that these searches were "fruits of the poisonous tree" as it is uncontested that they flowed from the initial search of the house.

REASONS FOR GRANTING CERTIORARI

I. A. A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE NEED FOR A SEARCH WARRANT IN ORDER TO EXECUTE AN ARREST WARRANT AT THE PREMISES OF A THIRD PARTY NOT NAMED IN THE ARREST WARRANT, WHEN POLICE OFFICERS ARE NOT CONFRONTED WITH EXIGENT CIRCUMSTANCES.

In United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), a panel of that Court held that:

> "The law of this circuit . . . is that when an officer holds a valid arrest warrant and reasonably believes that its subject is within the premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect." (citations omitted) 545 F.2d at 421.

In Cravero, DEA agents, acting on an informant's tip, observed and followed three defendants, two of which were fugitives from arrest warrants, to the house of a fourth defendant. After placing the premises under surveillance for a number of hours, the agents, armed with warrants for the two defendants and another, approached the house, knocked on the door, identified themselves, and announced possession of the arrest warrants. When a defendant opened the door and tipped off the others to the presence of the agents, the latter entered without permission, arrested one fugitive defendant in the living room and the other fugitive defendant, who brandished a pistol, in the hallway. Hearing scuffling from the bathroom, and fearing the presence of the third fugitive (who had a known propensity for violence), the agents entered the bathroom in hopes of apprehending him. Instead the agents found another defendant, a certain amount of cocaine, and other narcotic paraphernalia.

Following their unsuccessful motions to suppress, and convictions, the defendants appealed on the grounds that, inter alia, the agents, in the absence of exigent circumstances, needed

a search warrant to arrest the two fugitives in the third defendant's house. In reaching the opposite conclusion, the Cravero panel held that the test of the officers' behavior is properly framed in the terms of reasonable belief. Probable cause, it held, is a concept of reasonableness, and must "always be determined by a magistrate unless exigent circumstances excuse a search warrant." However, "reasonable belief embodies the same standard of reasonableness but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances." (Footnotes omitted). 545 F.2d at 421. The Court concluded that entry to execute an arrest warrant is treated by the Fifth Circuit as an exception to the requirement of a search warrant.

Several other circuits are in agreement with the essential holding in the Cravero case. In United States v. McKinney, 379 F.2d 259 (6th Cir. 1967), the contention that, in the absence of exceptional circumstances, a search warrant must be obtained before entering the dwelling of a third party to execute a valid arrest warrant, was rejected. At 379 F.2d 263, it was held:

> "We agree with the observation that the guarantee of the Fourth Amendment that people shall be secure in their homes from unreasonable searches applies whether the government is searching for objects or for a person for whom an arrest warrant has been issued. But even if we were to except appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant. An arrest warrant is validly issued only when a magistrate is convinced that there is probable cause to believe that the named party has committed an offense." (Footnote omitted).

The Court there considered the probable cause determination to issue the warrant and the inherent mobility of the suspect as justification for the search provided that the authorities reasonably believed he could be found on the premises searched.

Similarly, in United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972), it was held that "an officer with a warrant outstanding for the arrest of an individual named therein may enter upon private premises if he has reasonable cause to believe that such party can be found there." 467 F.2d at 423. Furthermore, the Court cited Rule 4(b)(1) of the Federal Rules of Criminal Procedure as supporting this position because of its command that once an arrest warrant issues, the defendant may be arrested at any place within the jurisdiction of the United States. Significantly, the Court characterized the police officers' actions in executing the search as reasonable, and stated "it is material that what the police were executing was a warrant to arrest a dangerous, usually armed man who is involved in a narcotics operation and was wanted for murder." 467 F.2d at 424.

Finally, the Tenth Circuit explicitly follows the holding announced in Cravero. In United States v. Harper, 550 F.2d 610 (10th Cir. 1977), a DEA agent received a fugitive arrest warrant for one Renita Black. The agent had previously that day received information from a reliable informant that Black was staying with Harper, and while not knowing the address that she was staying at, did provide the agent with her phone number. The phone company then traced the phone number to a certain address. The agent had received information from reliable informants that Black was staying with Harper and one Jackson, and that she had been seen in the latter's car. Upon arriving at the address, the agent was admitted by Jackson after he identified himself and related that he had a warrant for Black's arrest. Jackson then proceeded to tip Harper off that the agent

was there. The agent ran up the stairs and found Harper with an ashtray containing vegetable matter, later admitted to be marijuana. Harper dropped a sack which was later field-tested as heroin. Immediately thereafter the residence was secured while a search warrant was obtained to search the premises for drugs and weapons. The Tenth Circuit upheld the trial court's denial of the Motion to Suppress, holding that the trial court properly determined that the agent's initial entry was a lawful utilization of the arrest warrant for Black. Citing the initial opinion in Cravero the Court held that, unlike a search warrant which requires a prior judicial determination that the object sought is within the place to be searched, no such determination need be made before an arrest warrant issues. "Such a warrant requires only a judicial determination that there is probable cause to arrest a named person for a certain offense, without consideration of the place in which the arrest is to be made. . . an arrest warrant, therefore, in and of itself, imposes few or no limitations on the power of police to enter private homes in search of suspects." 550 F.2d 613-614.

Each of these cases, however, can be described as exhibiting an exigency upon which police officers had to immediately respond to in order to protect themselves or prevent the destruction of potential evidence. However, the logic of Cravero and similar decisions does not have a universal following. While the Supreme Court has not directly addressed this issue, language in previous opinions intimated that the warrant process would have to be observed. In United States v. Santana, 427 U.S. 38 (1976), a majority of the Court seemed to support the proposition that absent exigent circumstances a warrant would be needed for an entry of a home to make an arrest, except in instances where the entry is made under the "hot pursuit" exception established by the Court in Warden v. Hayden, 387 U.S. 294 (1967).

The Court has repeatedly held that searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. See Katz v. United States, 389 U.S. 347, 357 (1967). In Katz, the Court held that the Fourth Amendment protects an individual's reasonable expectation of privacy. The Court has also made clear that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from the Courts. See United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976). And in Mincy v. Arizona, 98 S.Ct. 2408 (1978), the Court stated that warrantless searches must be strictly circumscribed by the exigencies which justify their initiation. It was pointed out that the mere fact that law enforcement may be made more efficient can never by itself justify a disregard of the Fourth Amendment's warrant requirement. The Court went on to hold that "warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of the law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

At this juncture, it is relevant to point out that Cravero is a panel decision as to a very close and controversial issue. The apparent approval of warrantless entries into a third party's house contained therein came in a brief opinion, occasioned by a denial of petition for rehearing, contained largely in a few short paragraphs which attempt to retract a preceding detailed and lengthy analysis in the main opinion of the need for either a search warrant or exigent circumstances. In such a context it is submitted that each case must be analyzed with particular care as to its individual facts, rather than be subject to a blind application of the principal

enumerated in a conclusory pronouncement in ruling on a petition for rehearing. In fact the panel noted in the first Cravero opinion that:

> ". . . Nothing in the process of procuring an arrest for A considers or affords any protection for the entirely distinct Fourth Amendment right of B, into whose premises A may wander -- perhaps after the arrest warrant issues -- not to have B's premises invaded and ransacked for A without either a warrant or one of the customary excuses for its absence."
> 545 F.2d at 415.

Without the protection of a search warrant or exigent circumstances requirement, the spector of arbitrary invasions into private dwellings becomes a reality, accompanied by the very real threat of "police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed." 545 F.2d at 416.

Decisions in other circuits have been opposite to that reached in Cravero. In The Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), the Court was faced with a factual situation similar to the one involved here, except that in addition to an arrest warrant and probable cause to believe that the person named in the warrant was present on the third party's premises, the police were searching for people who had recently committed brutal murders. At 502 F.2d 928, the Court held that "arrest warrants are not substitutes for search warrants."

The Court continued to specifically state that "although police have warrants for the arrest of suspects, they may enter premises, at least of third person's, to search for those suspects only in exigent circumstances where the police officers also have probable cuase to believe that the suspects may be within."

The Court later went on to hold that certain exigent circumstances applied there, which in effect validated the warrantless entry.

That same year the Third Circuit was presented with a similar problem in Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974). There, persons whose apartments had been searched by police officers, who had arrest warrants for persons believed to be in the apartments, brought actions against police officers claiming Section 1983 violations of the apartment dwellers' rights. The Court stated that the Supreme Court has recognized that the physical invasion of the home is "the chief evil" to which the Fourth Amendment is historically directed, citing United States v. United States District Court, 407 U.S. 297, 313 (1972). The Court went on to hold that:

> "Even if exigent circumstances exist, police officers without a valid search warrant may not constitutionally enter the home of a private individual to search for another person, although he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time." 496 F.2d at 338.

At 496 F.2d 339 the Court continued, "in addition to probable cause, there must be exigent circumstances to justify a warrantless search."

Furthermore, the Fisher Court analyzed the inter-relation between the Fourth Amendment and probable cause and exigent circumstances. It was noted that the:

> "effective enforcement of the law . . . can only be maintained by respect for the law. High on the list of constitutional rights is the right of an innocent citizen to be free from unreasonable intrusion into the privacy of this home. A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home." 496 F.2d at 341.

However, the Third Circuit was clearly aware of the necessity for efficient law enforcement, and held that the police under exigent circumstances may dispense with the search warrant when they have probable cause to believe that the suspect named in the arrest warrant is in a particular third party dwelling. There the arrest warrant names a specific person, and therefore avoids the absue inherent in the type of general warrant that supported the formulation of the Fourth Amendment.

The Ninth Circuit has also recognized the balance between efficient law enforcement and the protection of third party Fourth Amendment rights. This balancing was apparent in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). In Prescott postal inspectors were investigating one Duvernay for using stolen credit cards to obtain merchandise by mail, and in the course of their investigation supervised a controlled delivery to one of the suspect's addresses. The postal inspector obtained a search warrant for Duvernay's apartment, but did not obtain a warrant for Duvernay. Appellant's apartment was located next door to Duvernay's on the top floor of a partially vacant apartment building. The police raided the apartment building following the controlled delivery, only to find that Duvernay's suspected address was only a padlocked apartment. The inspector then went to Prescott's apartment, knocked on the front door, identified himself as a postal inspector, and said that he was looking for a next door neighbor. Prescott lied, claiming that no one was in the apartment but her, her husband and her baby, when in fact her neighbor had appeared with the packages in hand only minutes before and had been let into the apartment. The inspector, after a conference with his colleagues, returned to Prescott's apartment and again unsuccessfully tried to get Prescott to open her door. After responding in the negative to Prescott's query as to whether the inspector had a warrant, and the inspector's

threat that Prescott could be guilty of an offense if she was harboring her neighbor, the inspector sought legal advice from the United States Attorney's office. The end result was that the police broke the door down, found Duvernay inside as well as the three packages prepared for the controlled delivery.

Prescott was indicted and subsequently convicted of being accessory after the fact by assisting Duvernay in order to hinder his apprehension. Her motion to suppress all fruits of the entry into her apartment was denied, the district judge taking the view that the officers needed no warrant to enter the apartment because they had probable cause to arrest Duvernay and to believe that he was inside.

The Ninth Circuit had previously stated only in dicta that the warrant requirement "is applicable not only in cases of entry to search for property, but also in cases of entry to arrest a suspect," United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974). But the Court noted that only exceptional circumstances have been held sufficient to justify a search conducted inside a private home without judicial authorization. 581 F.2d at 1349. The Court quoted McDonald v. United States, 335 U.S. 451, 456 (1948), where it was stated:

> "The Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing . . . that the exigencies of the situation made that course imperative." 581 F.2d at 1349.

The Court further reasoned that had the officers arrested the suspect on the street, and then entered Prescott's apartment solely to search for the packages, their certainty that the objects they sought would be found within would not have excused their failure to obtain a warrant. Likewise, had they gazed through a window and observed the packages lying on a table, in

plain sight, they would nonetheless have been obliged to submit their evidence to a magistrate for his disinterested determination that intrusion was necessary.

Thus the Court held, "the sanctity of the home is no less threatened when the object of police entry is the seizure of a person, rather than a thing. A magistrate's disinterested determination that governmental intrusion is warranted is no less desirable when the policeman's quarry is a suspect, rather than a piece of evidence." 581 F.2d at 1343. Citing People v. Ramey, 16 Cal. 3rd 263, 275, 545 P.2d 1333, 1340 (en banc) (1976), the Court held that it would be thoroughly incongruous "to pay homage to the considerable body that has developed to protect an individual's belongings from unreasonable search and seizure in his home and at the same time assert that identical considerations do not operate to safeguard the individual himself in the same setting," and that this reasoning is equally applicable when it is a third person, present in the home with the householder's consent for whom the police are looking. The Court concluded that absent exigent circumstances, police having probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest.

Furthermore, the Sixth Circuit in United States v. Shye, 492 F.2d 886 (1974), has held that warrantless entries of dwellings to effect an arrest are put on the same constitutional footing as warrantless entries of dwellings to effect a search. The Court held that entry in both instances is per se unreasonable "unless" exigent circumstances justify the failure to obtain a warrant.

The Eighth Circuit raised the similar issue in discussing the minimum requirements for a reasonable search in the case of Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), reversed on other grounds, Stone v. Powell, 428 U.S. 645 (1976). The Court there held that:

> "Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carries precisely the same Fourth Amendment implications as entry into a dwelling to make a warrantless search for tangible property. Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence. Thus, 'arrest warrants are not substitutes for search warrants'. Government of the Virgin Islands v. Gereau, 502 F.2d 914, 928 (3rd Cir. 1974).
>
> Consequently, we hold as have several other courts of appeals, that the Fourth Amendment mandates as a minimum, that police officers may not enter the dwelling or premises of a third person in search of a suspect for whom they have a valid arrest warrant unless they have reasonable or probable cause to believe that the suspect is within." 513 F.2d 1291-1292.

The Court further noted that given the factual setting of the case before it, it need not consider the exact question that is at issue here.

Other Courts have also come down on the opposite side of the issue from Cravero. In Huotari v. Vanderport, 380 F.Supp. 645 (D. Minn. 1974), the Court, while presented with a factual issue as to whether an arrest warrant had issued, did hold that "even conceding the existence of probable cause, the Court is not prepared to say that a search warrant is not necessary where the search is for a person rather than for 'effects'". 380 F.Supp. at 649. Moreover, in Norton v. Turner, 427 F.Supp. 138 (E.D. Vir. 1977), the district court discussed the standards applicable to execution of an arrest warrant at the residence of a third party not named in the warrant. This case was a Section 1983 cause of action resulting from the unsuccessful search of the plaintiff's premises by police officers looking for the then fugitive Patty Hearst. The plaintiff contended that the police were required to obtain a search warrant in order to lawfully execute the arrest warrant in the dwelling of a third person, and that only exigent circumstances can relieve the

officers of this obligation. The district court however was satisfied that if the officers had probable cause to believe that Ms. Hearst was in the apartment, their subsequent conduct was justified. The fugitive in question had demonstrated a capacity for both violence and evasive flight, and the Court cited Cravero for this proposition.

In addition at least one state court has followed the reasoning that an arrest warrant alone in the absence of exigent circumstances is not sufficient in order to seize the fugitive from the dwelling of a third person. In England v. State, 488 P.2d 1347 (Okla. 1971), police officers, equipped with both the knowledge that there was an outstanding arrest warrant for a person who was AWOL from a marine corps base and probable cause to believe that the fugitive was at a certain address, approached the address one evening. At that point the police officers smelled marijuana, and upon viewing the inside of the house through a window noticed the defendant and others smoking a marijuana cigarette. The police entered and arrested defendant. The Court of Criminal Appeals reversed defendant's conviction for possession of marijuana, the Court holding that the officers should have armed themselves with a warrant if they were going to a residence just to search for the suspect. The record was silent as to whether or not they found any trace of the person who was suspected of being AWOL. The Court held that to go to a private residence and search for an accused without a search warrant is not authorized by law. 488 P.2d at 1348.

Therefore, as can be seen, several circuit courts have been faced with the question posed in the instant case and decided that law enforcement officers entering the homes of third parties to effect an arrest should be armed with a search warrant or in the alternative, enter only where exigent circumstances exist. Thus, the essential issue in the immediate

inquiry must be whether exigent circumstances will be the only factors allowing police officers to disregard the need for a search warrant when executing an arrest warrant on the premises of a third person. Petitioner submits that the issue of exigent circumstances not only distinguishes his case, but also demonstrates the impropriety of the blanket rule as set forth in the second Cravero opinion.

In Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), in a leading, widely cited case, the Court held that entry into a home to make an arrest may not be undertaken without a search warrant and the requirement of a warrant may not be excused except under specially defined circumstances.

At 435 F.2d 389, the Court stated:

> "The Fourth Amendment provides protection even as to arrests in a public place, though in such cases the requirement is only that there be probable cause and there is no additional requirement of recourse to a warrant. A greater burden is placed, however, on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the private protection secured by the Fourth Amendment. In general a home may not be searched without a warrant notwithstanding probable cause."

The Dorman Court stated that warrantless entries may be justified by need when the officer acts within the bounds of probable cause and reasonableness. The Court outlined several considerations it thought would be useful in determining the propriety of a warrantless entry into a home to effect an arrest.

Among the exigent considerations enumerated were:

1. That a grave offense is involved, particularly one that is a crime of violence;
2. Whether the suspect is reasonably believed to be and therefore represents, a threat to the community or to the arresting officers;

3. There must be a clear showing of probable cause which includes reasonable trustworthy information to believe the suspect committed the crime involved;
4. There must be strong reason to believe that the suspect is in the premises being entered;
5. There must be reasonable likelihood that the suspect will escape if not swiftly apprehended;
6. The entry, though not consented to, must be made peaceably.

In applying the Dorman criteria to the instant case, it is clear the conduct of police officers here does not meet the minimal requirements of the Fourth Amendment as set out by Dorman.

First, the offense charged in the arrest warrant was not a grave one. Agents entered the dwelling to search for a "Ricky Lyons" who was charged with possession of marijuana. The Dorman Court suggested violence is usually the determinate of whether an offense is considered grave. Possession of marijuana is not a grave offense nor is it a crime of violence.

Second, there was no evidence to lead the agents to reasonably believe that the suspect sought, a "Ricky Lyons", would be armed, nor was there a showing of increased danger to the community or the officers involved had there been a delay for purposes of securing a warrant. In fact, the officers had ample time and opportunity to secure a warrant but chose not to do so.

Third, Petitioner concedes that there was an arrest warrant outstanding for Ricky Lyons but law enforcement officials did not have any warrant in their possession when they approached Appellant's home.

Fourth, the government agents did not have strong reasons for believing Ricky Lyons was in Appellant's home. To the contrary,

the agents had a mere tip that Ricky Lyons was on Appellant's premises. The agents did not conduct surveillance of the premises. The agents received information from a confidential informant who stated that he talked via telephone with a person named Jimmy and that he heard Ricky Lyons' voice in the background two days earlier. The confidential informant did not talk to Ricky Lyons nor did he have any other facts to support his contention that Ricky was in the location where the telephone conversation originated. The informant told the agents that "Jimmy" said that they (Jimmy and Ricky Lyons) could be reached at the telephone number given the agents. "Jimmy" was never identified nor was his reliability established. So armed with the mere telephone number of an unsupported allegation that Ricky Lyons would be on the premises, the governmental agents proceeded to execute the warrant at the appellant's residence. There existed no strong reason to believe Ricky Lyons was in the premises that were to be entered.

Fifth, the facts of the instant case cause it to fail the requirement that the suspect be swiftly apprehended to avoid escape. There existed no urgency. The agents had the information for almost two days and the agent in charge of the case stated that they had ample time to obtain a warrant to search the premises had they sought to secure one. Additionally, there was no other evidence to indicate impending flight by the suspect.

Sixth, the entry, although made under color of law, was not peaceable. The officers approached with shotguns. Service revolvers were drawn on the occupants.

Thus, the facts in Petitioner's case do not meet any of the criteria set out as exigencies in Dorman. This is a key distinguishing factor between Petitioner's case and Cravero and its progeny. These distinctions, plus the split in the Circuits, are strong reasons for granting the writ.

B. FOLLOWING PAYTON, THE FIFTH CIRCUIT DECISIONS IN CRAVERO AND IN THE INSTANT MATTER IGNORE THE FOURTH AMENDMENT RIGHTS OF THIRD PERSONS, AND IN EFFECT, OFFER LESS CONSTITUTIONAL PROTECTION TO THIRD PERSONS NOT NAMED IN THE ARREST WARRANTS THAN TO THOSE INDIVIDUALS WHO ARE THE SUBJECT OF THEM.

In the recent decision of Payton v. New York, 27 Cr.L.R. 3033 (USSC, 1980), the Supreme Court answered the question left open not only in its own opinions, but in those circuit opinions where Cravero-type issues were involved; namely by holding that the Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. While the majority opinion expressly avoided answering the question involved here, there can be no doubt that by further defining the Fourth Amendment rights of a suspect arrested in his own home, this answer will have a profound effect on the Fourth Amendment rights of suspects and third persons when law enforcement officers attempt to execute arrest warrants for fugitives on premises of third persons.

For example, suppose Fourth Amendment law is "frozen" at Payton. This means, that on one hand, police officers armed with probable cause and in the absence of exigent circumstances, must have an arrest warrant to enter and seize a suspect in his own dwelling. On the other hand, if Payton applies only to the requirement of a warrant to arrest a fugitive on his own premises, in the absence of exigency, the result would be anomolous and illogical constitutional applications in about half of the federal jurisdictions in the country. This is because their execution of arrest warrants on third person's premises would require either (a) at least probable cause to believe the suspect is located therein, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc); or (b) probable cause and exigent circumstances, Dorman, supra; or (c) probable cause and an arrest warrant, Cravero, supra.

Even assuming that the arrest warrant requirement would be extended to arrests of fugitives on third person's premises, none of the above examples provide any more protection to the third person against unreasonable searches and seizures. The result, therefore, would be no difference at all between the arrest by arrest warrant of the fugitive on his own premises and the arrest by arrest warrant of the fugitive on the premises of a third person not named in the arrest warrant, with no provision for third person's rights. There can be no doubt that disregarding the third person's Fourth Amendment rights creates a grave constitutional dilemma.

The majority opinion's language in Payton is instructive. At 27 Cr.L.R. 3037, the opinion cites Judge Leventhal's conclusion that an entry to arrest and an entry to search for and to seize property implicate the same interests in preserving the privacy and sanctity of the home, and justify the same level of constitutional protection. Petitioner submits that the existence of an arrest warrant for the arrest of a fugitive does absolutely nothing to preserve the privacy and sanctity of the home of the third person upon whose premises the arrest warrant was executed.

In addition the Court continued, "in terms that apply equally to seizures of properties and seizures of persons, the Fourth Amendment has drawn a firm line to the entry of the house. Absent exigent circumstances that threshold may not reasonably be crossed without a warrant."

Finally, the concluding language in Payton holds much significance for the case at bar. "Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause explicitly carries with it the limited authority to enter a dwelling in which the suspect lives, when there is reason to believe the suspect is within." (27 Cr.L.R. at 3041) (emphasis supplied). Therefore, it can be seen that the requirement of an arrest warrant in order to

arrest a suspect in his own home, as stated in Payton, ensures that the Fourth Amendment rights of the suspect are protected because of the sanctity that his home constitutionally holds for him. An arrest warrant of the same suspect on a third person's premises would not protect the sanctity of the third person's home.

The holding in Payton merely confirms in express terms what the Court has sometimes said only impliedly in regards to its preference for judicially approved warrants. The classic statement of this police was made in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement to support the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out the crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the peoples' homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Historically, however, the need for warrants and the requirements of both a search warrant and an arrest warrant have been confusing. As the Fourth Amendment states:

> "The right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

> Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis supplied).

Police authority to conduct searches for property is constrained by the general rule that searches without a search warrant are per se unreasonable unless they fall within certain specific exceptions. Therefore, the issuance of the search warrant usually depends upon a judicial determination of both the need for the proposed seizure and the probable cause to believe the object sought is within the place to be searched.

On the other hand, if the object of the search is a person, the rule seems to be that all that is necessary is an arrest warrant. Further, the arrest warrant, unlike the search warrant, does not require any prior judicial finding of the need for the police to search or of the probability that the search will be fruitful. Moreover, arrest warrants require no reference to the places that may be searched in effecting the arrest. For example, nothing in Rule 4 of the Federal Rules of Criminal Procedure refers to the place to be searched. And historically, persons who are the object of a search have not been constitutionally characterized as have "things" that are the object of a search, even though both "objects" are listed side-by-side in the amendment. Only Delaware and Vermont statutorily provide for a search warrant for persons. See Rotenberg and Tanzer, Searching for the Person to be Seized, 35 Oh. St. L. J. 56, 58 (1974), where it is concluded that there is no satisfactory justification for the difference and that, therefore, the Fourth Amendment requires that the legal standard and procedural practice developed for searches for objects be applied to searched for persons.

Moreover, in addition to the confusion resulting from the different warrant requirements regarding searches for persons and searches for objects, in 2 W. LaFave, Search and Seizure §6.1 (1978), it was noted that uncertainty has resulted from courts' use of the general word "warrant", instead of differentiating between a search warrant and an arrest warrant. "Perhaps as

a consequence of this or perhaps because warrants to search for a person are unknown in many jurisdictions, many of the cases holding or assuming that a warrant is required for a nonemergency arrest entry assume without question that an arrest warrant rather than a search warrant is required," (footnotes omitted), although there is a growing body of authority that states that what is required when an arrest warrant is executed upon a third party's premises is a search warrant. p. 383-384. Professor LaFave continued:

> "When entry into premises other than those of the person to be arrested is contemplated, then surely it is the protection provided by a search warrant rather than an arrest warrant which is most needed. . . A prior judicial determination of the grounds to arrest a person the police believe is therein will primarily protect that person, who is not deemed entitled to such protection when arrested on the street, but would only indirectly protect the person whose premises are intended to be entered. The latter individual would more directly benefit from a judicial determination as to whether it is probable the wanted person is precisely in those premises, which also is likely to be a more complicated issue than the probable-cause-to-arrest question." (footnotes omitted) pp. 384-385.

C. THE CRAVERO OPINION UPON REHEARING, FOLLOWED BY THE FIFTH CIRCUIT IN THE INSTANT MATTER, IS CONTRARY TO BOTH SUPREME COURT AND FIFTH CIRCUIT DECISIONS.

In its initial decision, the Cravero Court waivered between what it saw as the few or no limitations on the power of police to enter private homes in search of suspects when equipped with arrest warrants, and the need for a disinterested judicial officer whose approval for a search could apply only to a particular place and after a showing of probable cause.

At 545 F.2d 416, the Court seemed to finally adopt the very legal reasoning that Petitioner is advocating:

> "Only in certain carefully defined classes of cases is a warrantless search permitted. This preference for a prior judicial determination should control a contemplated entry of a third party's home, regardless of what is sought. While the ultimate objective of an arrest entry is an arrest, the arrest can only be effected if the subject is first found and thus a search is a necessary factual prerequisite to the possible arrest. A search warrant would be required, in the normal case and absent some exception, to enter a residence to search for a stolen pet or other objects seen carried into it. We are unable to see a distinction valid for Fourth Amendment purposes between an entry to search for such an object and entry to apprehend a quest. Consequently, logic demands that the rules governing searches should apply with equal force to an arrest entry into a third party's home. If the policeman has probable cause to believe that a suspect he wishes to arrest is inside the home, he can demonstrate this to a magistrate and obtain a search warrant for the suspect. If he fails to obtain a warrant, then an arrest entry without a search warrant will be permissible only if exigent circumstances or some other established exception to the warrant requirement obtains. (Emphasis supplied).

The panel was wary lest some other result would raise the spectre of police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed. "Furthermore, a requirement of exigent circumstances will not unduly burden law enforcement officials or create additional danger, since such factors are given considerable weight in the exigent circumstances determination." Id. (Footnote omitted).

At this point, the panel opinion began to muddy the waters. The panel was evidently concerned about the difference between an illegal entry in order to effect an arrest and an invalid arrest. The Court, of course, was essentially correct

in realizing that an illegal entry for purposes of executing a valid arrest warrant would not necessarily invalidate the arrest and require that the arrested fugitive be set free. However, the Court confused, as in the instant matter, the difference between the Fourth Amendment requirements for the fugitive and the separate, individual and independent requirements of the Fourth Amendment as applicable to the third person upon whose premises the arrest warrant is executed. In United States v. Cisneros, 448 F.2d 298 (9th Cir. 1971), it was noted that "the legality of the entry is a question apart from the initial validity of the arrest, whether it is based upon a warrant or probable cause. (Citation omitted). Assuming a valid basis for arrest, an illegal method of execution, for instance, an unlawful forcible entry, can result in the exclusion of any evidence obtained as a result of the officer's illegal conduct." 448 F.2d at 303 n.6. The same logic would seem to apply in the instant case. There is no logical reason to contend that evidence seized from an arrestee by police officers illegally, even though the factual predicate to the illegal seizure was a valid arrest, is remedied by suppression, but that third persons, upon whose premises an arrest warrant was executed and who are likewise aggrieved by an illegal search and seizure, have no right in suppression.

Furthermore, the Cravero Court held that since the arrest, if not the entry, was proper, arrest warrants represented judicial sanction of the deprivations of the suspects' liberties. However, this provides absolutely no safeguard to the constitutional rights of the third person whose right to privacy and sanctity in his own home was trampled upon.

But, upon rehearing, the panel cited the Supreme Court's decision in Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925), as standing for the proposition that an entry to execute an arrest warrant is an exception to the

requirement of a search warrant to intrude into a home. 545 F.2d at 421. However, the facts and holding in Agnello are contrary to this. In Agnello, it was held that once the suspects were arrested in one residence, the police officers could not then go around the corner and search and seize contraband from one of the suspect's houses without a search warrant. At 46 S.Ct. 6, it was stated:

> "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. (Citations omitted) . . . The search of a private dwelling without a warrant is in itself unreasonable and abhorant to our laws.
>
> * * *
> Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The panel rehearing claimed that it had "overlooked" the law of the Circuit, that when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect. For its authority, the panel relied upon two cases in which a key factor in both was exigent circumstances. As to the original decision's fear that without the protection of a search warrant or exigent circumstances requirements, the spectre of arbitrary invasions into private dwellings becomes a reality, accompanied by the very real threat of "police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed," the instant case presents just that situation.

There was no exigency here -- no suspect alerted so that flight or destruction of evidence was a possibility. No inconvenience or delay would have resulted from the procurement of a warrant. Agent Goodowens was in the federal courthouse during business hours on a weekday when, at about 2:00 p.m., he received the final call which triggered the raid.

Further, an analysis of the facts of the instant case demonstrates numerous critical distinctions from the factual situation presented in Cravero and the cases expressly relied upon there in United States v. James, 528 F.2d 999 (5th Cir. 1976) and Rodriquez v. Jones, 473 F.2d 599 (5th Cir. 1972).

Cravero involved an ongoing drug investigation in which government agents, acting on an informant's tip, themselves observed Chandler and Cravero in a restaurant. Both men were followed and seen entering a house, again by law enforcement personnel. This house was placed under surveillance and the actual arrest warrants were obtained. The agents, with the arrest warrants, knocked on the door. It was opened by the house owner who shouted, "Hey you guys, the police," after which the officers entered and saw contraband in plain view. 545 F.2d at 412-13.

Rodriquez, supra, involved a shooting following forcible, warrantless entry in a residence where police mistakenly believed there were two men there who were suspected of murdering three deputy sheriffs just three days before. The information placing the suspects in the residence came from a C.I., previously proving reliable, who stated that he had seen the two suspects enter the garage. Further, the C.I. was taken by the apartment by officers three times, and each time he confirmed it to be the location he himself saw the men enter. 473 F.2d at 606.

was apparently unoccupied at the time. (Query: what would have been the officers' actions if people had been found in the A-frame house?). Most damning of all, is the fact that in the instant case no attempt of any kind was made to surveil the premises before an armed raiding party swooped down with weapons drawn on both residences.

In addition, the forceful manner in which the searches were executed must also be considered. In Cravero the officers approached peacefully and were met by the resident at the door, entering only after that person attempted to alert the others. In a case involving a similar issue (entering into a suspect's home to arrest on probable cause), United States v. Santana, supra, Justice White emphasized in his concurring opinion that "a warrant was not required to enter the house to make the arrest, at least where entry by force was not required." 427 U.S. at 43-44 (emphasis added).

Here the force was unnecessary and excessive. Two men, neither of them fugitives, were accosted at shotgun point by a portion of a raiding party numbering nine or ten men, thrown up against a car, frisked and detained. A young woman who truthfully told Agent Smith who she was, who the men seized at the car were, and that no one else was in the house, was accosted at gunpoint and placed against the wall and detained under guard as the house was searched.

Finally, the instant case raises the spectre referred to in the original Cravero opinion -- police circumvention of the warrant requirement through use of an arrest warrant. 545 F.2d at 416. While Agent Goodowens in his testimony attempted to downplay the significance of the C.I.'s information regarding the possible presence of contraband at the location, the testimony of Detective Fowler that Wayne Smith told him there might be "1500 pounds" of marijuana there strongly indicates something more was involved in their trip to see if Ricky Lyons was present.

James, supra, likewise involved a tip by informer that a fugitive was present at a particular location. Moreover, before the house was entered, agents announced their intention over a bullhorn, and repeated twice their purposes and requests. This occurred during daytime hours, and entry was made only subsequent to the officers being fired upon by occupants of the building. The facts presented in the instant case set up distinct and critical contrasts to these three cases. First, the instant case involved the pursuit of a federal fugitive on an indictment over eight months old for a non-violent crime (a marijuana offense) (1st Supp. Vol. I, p. 45, 47). Clearly this case lacked any element of freshness or emergency to justify unusual steps such as seen in Rodriquez and James, supra.

Further, the officers here, unlike those in Cravero in particular, did not have in their possession the actual arrest warrant for the fugitive they were allegedly seeking (1st Supp. Vol. I, p. 47). In fact none of the officers had even seen an arrest warrant for Lyons and no copy of the warrant was even available in the Atlanta area at the time (1st Supp. Vol. I, p. 47). While possession of the actual warrant in hand seems not to be a requirement under federal law, it is a requirement under Georgia law, State v. Shafer, 193 Ga. 748 (1942). Further in United States v. Harper, supra, it was held that "in the absence of a contrary federal statute, as in the case at hand, the validity of an arrest is controlled by the law of the state where the arrest occurred." 550 F.2d at 614. In Harper, a case that cites Cravero as law, there existed a Kansas statute which allowed the entry into a building to execute an authorized arrest. The policy reasons for such a requirement are clear and strong -- a legal document should be available to justify to persons present the necessity of the entry and procedures accompanying it. Michigan v. Tyler, 98 S.Ct. 1942 (1978).

Moreover, the Court in Cravero emphasizes that the situation envisioned there is one which "allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate . . ." 545 F.2d at 421 (emphasis added). Cravero, as the Court emphasizes in its opinion, involved one contemporaneous trip to a judicial officer, and merely excused a second trip. In the instant case there was no trip to the magistrate, but merely reliance on Agent Goodowens' memory that Lyons had been indicted in July of 1977 for a marijuana offense and had not been brought to trial.

In regard to the probable cause, or reasonable belief as to Lyons' presence at the residence, a strong contrast exists with the existing cases approving warrantless entry. Cravero involved the officers themselves seeing the two sought-after fugitives enter and remain in the house. Rodriquez involved a reliable C.I. plus further corroboration of his information by officers taking him by the location three times. James involved a reliable C.I. plus a bullhorn announcement, with entry following only after a shootout. Here, we have a C.I. providing information which is clearly not based on first-hand observation, followed by a clear and seemingly intentional failure of the officers to take any steps to corroborate the information prior to a full-blown armed raid. Although these officers here determined that a house on Carey Court had the specific telephone number referred to by the C.I., they had only been able to determine the "general location" of the house from Southern Bell. Although they determined the phone was listed to a Richard E. Fisher, no effort was made to either contact or even investigate the apparent owner of the residence. Further, upon arrival at the location, agents were faced with two houses at the same address. Not knowing which house they were looking for, the agents hit both houses, with drawn weapons, leaving the second only after discovering that it

The facts and circumstances of the instant case require a reassessment of the applicability of the principles enumerated in Cravero. The instant case illustrates the fear spoken of in the main opinion in that case and the facts here -- most notably the conduct of the officers -- will require significant and dangerous expansion of the limited concept adopted in the opinion of the Court on the petition for rehearing.

II. ASSUMING ARGUENDO THAT THE FIFTH CIRCUIT OPINION IN CRAVERO ENUNCIATES GOOD LAW IN REGARD TO THE REQUIREMENTS OF THE FOURTH AMENDMENT, THE WARRANTLESS ENTRY INTO PETITIONER'S HOME WAS MADE WITHOUT SUFFICIENT PROBABLE CAUSE TO JUSTIFY THE INTRUSION.

In its opinion on the petition for rehearing, the Court in Cravero adopted a test of "reasonable belief". On close reading, this is merely a substitute for probable cause, adopted because the implication contained in the term probable cause is the requirement of either a magistrate's determination or exigent circumstances. 545 F.2d at 423. First, the validity of this statement should be analyzed in light of Ybarra v. Illinois, 100 S.Ct. 338 (1979), where it was held that the requirement that a search or seizure of a person be supported by probable cause particularized with respect to that person cannot be undercut or avoided by simply pointing to the fact that coincidently there exists probable cause to search or seize another, or to search the premises where the person may happen to be. However, in essence, what the Cravero court says is that it will apply a concept of reasonableness which "embodies the same standards of reasonableness" as probable cause, but remove the implication of either magistrate or exigency. Id.

As a consequence, when the "reasonable belief" of the officers as to the presence of the fugitive is based on information supplied by a C.I. instead of their personal observation as is found in Cravero, this "reasonable belief" should be analyzed in

terms of the case law governing probable cause determination based on similar situations, with the principal point of departure being the two-pronged analysis developed by the Supreme Court in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and discussed in Spinelli v. United States, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). After the C.I. meets the reliability test, there must be an examination of the "underlying circumstances" -- the manner in which the information was gathered by the C.I. What is generally required is a statement from the C.I. containing sufficient detail or representation permitting the magistrate to determine the C.I.'s conclusions were justified and not mere rumors or suspicion. In the absence of this, corroborating evidence as to the tip developed by the officers and submitted along with the tip is acceptable. Id.

An analysis of the tip in this case in light of these principals demonstrates that its "underlying basis" was clearly lacking. As a consequence, the reasonable belief test of Cravero was not met.

The first report of the confidential informant to Agent Rassey of any substance came on January 16, 1978. Previous reports had been nonspecific information (on January 4, 1978) (1st Supp. Vol. II, p. 34, 41) and (on January 14, 1978) a telephone number for Ricky Lyons and "Jimmy" good only for "24 hours" (1st Supp. Vol. II, p. 36). On January 16, 1978, however, the C.I. called Rassey and told him he talked to "Jimmy" and heard a voice he identified as Ricky Lyons in the background and they were calling from a specific number. When pressed by Rassey for more details -- the underlying circumstances -- the confidential informant could not tell him where the residence was located or if Ricky Lyons and "Jimmy" lived there, only that they were at that number "for a while" (1st Supp. Vol.

II, p. 39). Again and again in his testimony, Rassey admits that he accepted the conclusion of the confidential informant that they would be there:

> A. . . . All he knew was that they were there and that they were going to be there for a while. (1st Supp. Vol. II, p. 39).
>
> * * *
>
> A. I asked him, "Are you sure they are both going to be there?" He said, "Yes". That's all he told me. (1st Supp. Vol. II, p. 47).
>
> Q. Did he give the basis of this belief?
>
> A. I asked him about that. I says, "How do you know," he says, "Well, I just know that there's, you know, some people there."
>
> Q. Just speculation?
>
> A. I don't know. (1st Supp. Vol. II, p. 48).

Even more telling is an examination of the basis for the confidential informant's critical conclusion that the call reported to Agent Rassey on January 16, 1978 came from the telephone number that Ricky Lyons and "Jimmy" were to be found at. On cross-examination on this point Rassey gave the following answers:

> Q. He [the confidential informant] told you [on January 16, 1978] that he was speaking with a guy named Jimmy and he heard Ricky's voice, or a voice he identified as Ricky's in the background, is that correct?
>
> A. (Agent Rassey) Yes.
>
> Q. Ok. Where was he speaking from at the time? I mean Jimmy when I say "he". Did your informant tell you that?
>
> A. They were at the number that he had given me near Atlanta.
>
> Q. How did you ascertain that from your informant?

A. I asked him. I says, "Where are they at?" And he says, "They're at the number I gave you." I says, "Are you sure?" He said "Yes".

Q. Did you go into the basis for that, how he knew that?

A. No I didn't, I just asked him if he was positive, and he has always given me good information before. He said he knew they were there. (1st Supp. Vol. II, p. 50) (emphasis added).

Finally, on the very day of the raid, the last communication from the C.I. to Rassey was that "the information he had given me was still good." (1st Supp. Vol. II, p. 49).

A careful review of the information furnished by the confidential informant to Agent Rassey yields the conclusion that there is a complete dirth of the requisite underlying circumstances -- the necessary detail to show the informant had hard information and not just rumor. Moreover, the conduct of the officers in Georgia did nothing to provide -- or even attempt to provide -- corroboration for the C.I.'s information. All they found was that the number was listed in the Buford area to a Richard Fisher. No individual known to associate with Richard Lyons was seen or connected with the location. Even the particular house was not located. Most critically of all, no surveillance was undertaken or even attempted (1st Supp. Vol. I, p. 52). A raid was mounted and launched and carried out with extreme and unreasonable force on the basis of a series of tips by a confidential informant, and the tip failed to meet the second prong of the Aguilar test.

As such there has been no showing of the requisite "reasonable belief" necessary under Cravero to justify the warrantless entry, with force, into the residence, and the contraband and all other items seized as a result of and as fruits of that entry should have been suppressed.

Significantly, Judge Kravitch of the Fifth Circuit panel dissented from both the original panel decision and the denial of the Petition for a panel rehearing on the grounds of a lack of probable cause. In her initial dissent, the Judge noted the factual distinctions between Cravero and the instant case. The arresting officer had not observed Ricky Lyons, the subject of the arrest warrant. The arresting officer's belief that Lyons was within the premises was based solely on an informant's tip. As distinguished from Rodriquez, supra, the informant had not seen Lyons on the premises, but had merely heard his voice in the background during a telephone call from Jimmy. After matching the telephone number with the residence, the officers, without first applying to a detached magistrate for a search warrant, proceeded to the premises where they detained the defendants and after entering and looking through the rooms, discovered not the subject of the arrest warrant but a cache of cocaine. "As in Cravero there was an arrest warrant but no exigent circumstances; unlike Cravero the evidence linking the subject to the premises was extremely fragile and insufficient to justify an entry without a search warrant." 606 F.2d at 548.

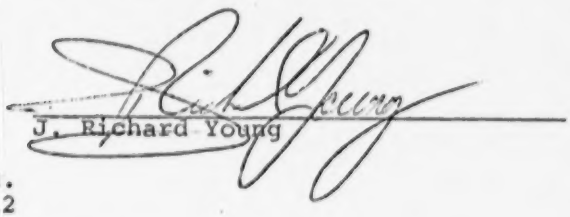
Furthermore, Judge Kravitch cited the Supreme Court's opinion in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), wherein the doctrine announced in Terry v. Ohio, 392 U.S. 188 S.Ct. 1868, 20 L.Ed.2d 889 (1968), was extended to include a stop based not only on the policeman's observations but also on an informant's tip which did not satisfy the Aguilar and Spinelli criteria. "Adams and Terry involved a minimal invasion of privacy, however, as compared with the greater intrusion occasioned by the search of a third party's private home. When an intrusion of such magnitude occurs, if not based upon the policeman's personal observations, nothing short of a full-fledged Aguilar/Spinelli tip should be acceptable." 606 F.2d at 549.

Finally, Judge Kravitch also dissented from the per curium opinion denying the petition for rehearing. Besides expressing concern over the extension of the Cravero rule, "a rule of questionable validity and wisdom even in the less egregious circumstances present in that case," the Judge disagreed with the majority that the tenuous information appended to the panel opinion satisfies the teachings of Aguilar and Spinelli. 615 F.2d at 644.

CONCLUSION

For the above-mentioned reasons, a Writ of Certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully Submitted,



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APPENDICES

Moye, Jr., J., convicted defendants of possession of cocaine and of conspiracy to possess cocaine with intent to distribute and convicted one of the defendants of unlawful importation of cocaine, and defendants appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) agents had objective grounds for forming reasonable belief that fugitive was present at third party's premises, and thus warrantless entry of premises was proper, even though fugitive named in arrest warrant was not found to be present on premises at the moment of entry; (2) refusal of district court to order Government to provide defendants' expert witness with primary reference sample for use in an independent laboratory analysis was not a denial of due process of law; (3) evidence was sufficient to sustain convictions; (4) trial court did not err in failing to dismiss indictment on grounds of double jeopardy; and (5) trial court did not err in giving supplemental charge to the jury.

Affirmed.

Kravitch, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Arrest ⇐68

When an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject.

2. Arrest ⇐68

Where valid warrant for arrest of certain individual was outstanding and first-hand information from reliable informant established that that individual recently had been and was believed still to be in the dwelling containing certain telephone, Drug Enforcement Administration agents had objective grounds for forming reasonable belief that fugitive was present at the premises in question when they entered and, having such a reasonable belief, warrantless entry of premises was proper.

3. Arrest ⇐68

Fact that fugitive named in arrest warrant was not found to be present on third person's premises at moment of entry by agents did not render entry invalid.

4. Constitutional Law ⇐268(5)

District court's refusal to order Government to provide defendants' expert witness with the primary reference sample for use in an independent laboratory analysis did not deny defendants due process of law, where defendants failed to show that denial prevented their expert from conducting an independent analysis to show that seized substance was not cocaine. U.S.C.A.Const. Amends. 5, 14; Fed.Rules Crim.Proc. rule 16(a)(1)(C), 18 U.S.C.A.

5. Conspiracy ⇐47(12)

Drugs and Narcotics ⇐123

Evidence was sufficient to sustain conviction of possessing cocaine and conspiracy to possess cocaine with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

6. Criminal Law ⇐1144.13(7)

Sufficiency of evidence to establish defendant's knowledge and intent had to be viewed in the light most favorable to the Government on appeal with all credibility choices considered in support of the jury verdict.

7. Criminal Law ⇐182

Under ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial, but where "prosecutorial overreaching" is present, interests protected by double jeopardy clause outweigh public interest in conducting second trial ending in acquittal or conviction; to find such "prosecutorial overreaching," government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudice a defendant, causing him to reasonably conclude that continuation of tainted proceeding will result in a conviction. U.S.C.A.Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⇐182

In order to determine whether there exists prosecutorial overreaching barring retrial following mistrial, analysis must consider totality of the circumstances prior to the mistrial.

9. Criminal Law ⇐182

Where transcript of defendant's statement which prosecutor provided to the press contained no information that had not been introduced previously in the presence of the jury, where prosecutor's actions appeared to have been motivated by defendant to ensure accuracy in the press' accounts, trial court did not err in denying motion to dismiss indictment on grounds of double jeopardy following mistrial which was required because of publication of prejudicial article in local newspaper, despite defendant's claim that prejudicial material in the article arose from statement attributed to defendant and furnished to the press by the prosecutor, as prosecutor's actions did not constitute "prosecutorial overreaching." U.S.C.A.Const. Amend. 5.

10. Criminal Law ⇐863(2)

In prosecution for possession of cocaine and for conspiracy to possess cocaine with the intent to distribute, trial court's supplemental charge to the jury, which expressly cautioned jury not to consider supplemental charge in isolated context but to consider entire charge as given, ascribing no greater weight to supplemental charge than to original charge, was proper, where original and supplemental charges, when considered as combined charges, accurately covered points of law at issue.

Albert M. Horn, Atlanta, Ga., for defendant-appellant in 78-5329.

Robert A. Boas, Asst. U. S. Atty., Atlanta, Ga., for U. S. in both cases.

P. Bruce Kirwan, Federal Public Defender, J. Richard Young, Asst. Public Defender, Atlanta, Ga., for defendant-appellant in 78-5416.

William L. Harper, U. S. Atty., Atlanta, Ga., for U. S. in 78-5416.

Appeals from the United States District Court for the Northern District of Georgia.

Before THORNBERRY, CLARK and KRAVITCH, Circuit Judges.

CHARLES CLARK, Circuit Judge:

Hoyt A. Gaultney and Gary K. Steagald were convicted of possessing cocaine in violation of 21 U.S.C. § 841(a)(1), and with conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 846. Additionally, Gaultney was convicted of the unlawful importation of cocaine in violation of 21 U.S.C. § 952(a). They appeal, raising a variety of issues. We affirm.

Gaultney and Steagald argue first that the original entry by local police and federal agents into the premises in which cocaine subsequently was found was unlawful, in that the entry was neither pursuant to a search warrant nor justified by probable cause and exigent circumstances. The evidence shows that on January 4, 1978, Special Agent Joseph Rassey of the Federal Drug Enforcement Administration [DEA] in Detroit, Michigan, was contacted by a confidential informant. The informant advised that he might be able to locate "Ricky Lyons," whom he believed to be wanted by the DEA, and another individual named "Jimmy," whom he believed to be wanted on state drug charges in Georgia. The informant advised that "Jimmy" currently was using the alias "Carl James." Additionally, the informant stated that he had known both of these individuals personally.[1] Agent Rassey did not know the status of either individual, but because this informant's information had been reliable in the past,[2] Rassey told the informant to call as

1. Special Agent Rassey testified that the confidential informant had known "Jimmy" and Ricky Lyons for a number of years and had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977.

2. Special Agent Rassey testified that he had known the informant for approximately four or five years, that the informant had furnished reliable information to the DEA in the past, and that on the basis of such information seven

soon as the individuals were located at a definite spot. On Saturday evening, January 14, 1978, Rassey received a telephone call from the informant advising that he had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours.[3] The informant gave this telephone number to Rassey, who, in turn, gave it to Special Agent Kelly Goodowens of the DEA's Savannah, Georgia, District Office on Monday, January 16. Goodowens was aware that one Richard Harrison Lyons, a/k/a "Ricky" Lyons, had been indicted six months earlier in the Southern District of Georgia, in a marijuana smuggling case. Upon further investigation, Goodowens determined that an arrest warrant had been issued for Lyons and that the DEA still listed Lyons as a fugitive. Thereafter, Goodowens contacted the telephone company and learned that the telephone number provided by Agent Rassey's informant was listed to a Richard E. Fisher at a rural address in Buford, Georgia.

On Monday, January 16, 1978, Rassey received another telephone call from his informant, who advised that a recent telephone conversation with "Jimmy" confirmed his presence at the telephone number previously given Rassey by the informant. The informant also stated that Ricky Lyons was at the same location, noting that he had heard Lyon's voice in the background during his telephone conversation with "Jimmy." Rassey had several other telephone conversations with the informant between January 16 and the morning of January 18. Each time the informant confirmed that "Jimmy" and Ricky Lyons were still at the location of the telephone number. The informant also advised Rassey that several other people would be with Lyons at the location. This information was passed along to Goodowens by Rassey in a series of telephone conversations, the last taking place on the morning of Wednesday, January 18, 1978.

On the afternoon of January 18, Goodowens and DEA Agents Wayne Smith and James Williams, after consulting with a telephone company installer and local police, located the address to which the telephone number was listed. On driving past the house, these agents observed a Volkswagen parked in the driveway and smoke coming from the chimney of the house. No people were observed outside in the vicinity of the house or automobile. Approximately thirty minutes later, after coordinating plans for the execution of the arrest warrant on Ricky Lyons, Agents Goodowens, Smith, and Williams led a force of approximately twelve federal agents and local police officers to the residence. Upon approaching the house, Goodowens and Smith noticed two men located near the rear of the parked Volkswagen, which now had its engine cover up. Smith at first believed one of the men to be Ricky Lyons, but, upon realizing he was not, continued toward the house. One of the two men, later identified as Gaultney, was armed. Both Gaultney and the other man, later identified as Steagald, were detained pending Smith's return from the house.

Agent Smith arrived at the house and knocked on the front door. Gaultney's wife, Cathy, answered the door. Smith advised Mrs. Gaultney that he was a police officer with an arrest warrant. He asked to come into the house and was admitted. Smith told Mrs. Gaultney he had an arrest warrant for Ricky Lyons and asked if Lyons was in the house. Mrs. Gaultney stated that there was "no one by that name" in the house. Smith then told Mrs. Gaultney to place her hands on the wall and asked Detective Conway to watch her.

drug-related arrests had occurred. Rassey further testified that three convictions had been obtained in those cases and that four cases were pending. Counsel for Gaultney admitted at oral argument that the past reliability of the confidential informant was not at issue.

3. Special Agent Rassey testified that: "On the day the informant called me and said he had received a phone number from Jimmy, and it was a number where Jimmy and Ricky were going to be within the next twenty-four hours."

Smith began a sweep search of the premises.

Agent Smith walked down a short hall to his right and looked first in a bathroom situated between two bedrooms. Seeing no one in the bathroom, but observing a light coming from under the door to the front bedroom on his right, he opened the door and entered. Immediately inside Smith observed a small table upon which was a set of triple beam balance scales, a clear plastic bag containing a white powder, and a box containing a roll of clear plastic bags. Smith completed the sweep search of the premises without locating Lyons. He returned outside to advise the other officers of what he had discovered in the house. Agent Goodowens then entered the house and, upon entering the front bedroom, saw the scales, the bag of white powder, and the roll of plastic bags on a small table, together with what appeared to be more bags of white powder partially visible inside a green garbage bag lying in an open suitcase on the bed. Approximately fifteen minutes later, Agent Smith left for Atlanta to obtain a search warrant for the house. Upon obtaining a warrant, Smith telephoned the agents who had remained at the house and advised them of the existence of the warrant.

About this time, a truck occupied by a man and woman arrived at the house. Based on information obtained from appellant Gaultney, the agents believed the truck to contain "Jimmy," the state fugitive about whom Rassey's informant had spoken. This individual immediately was detained on his entry to the house and initially declined to identify himself any further than his first name of Jimmy. Later, the individual produced a North Carolina driver's license bearing the name "Carl James." That evening, the individual was identified as James Albert Smith, who was wanted by state authorities on drug charges.

A subsequent search of the house conducted pursuant to the warrant obtained by Agent Smith revealed a variety of narcotics processing paraphernalia and some 43 pounds of almost pure cocaine.[4]

[1] The law of this circuit is settled that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject." *United States v. Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied sub nom. Miller v. United States*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977), *and cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). *See United States v. James*, 528 F.2d 999, 1017 (5th Cir. 1976), *cert. denied sub nom. Henry v. United States*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1977); *Rodriguez v. Jones*, 473 F.2d 599, 605–06 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973). As stated in *Cravero*, the test properly is framed in terms of the officer's reasonable belief.

> Reasonable belief embodies the same standards of reasonableness [as does probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

545 F.2d at 421.

[2, 3] A review of the facts in this case discloses that a valid warrant for the arrest of Richard Harrison Lyons, a/k/a "Ricky" Lyons was outstanding and that first-hand information from a reliable informant established that Lyons recently had been and was believed still to be in the dwelling containing the telephone. Based on these facts, the agents had objective grounds for forming a reasonable belief that the fugi-

4. The search revealed a clear plastic bag containing 450 grams of 45% pure cocaine hydrochloride, two suitcases containing 8,394 grams of 99% pure cocaine hydrochloride and 10,445 grams of 95% pure cocaine hydrochloride respectively, a box of clear plastic bags, two sets of Ohaus triple beam balance scales, and a bag containing beta-manitol, a common cutting agent for cocaine.

tive was present at the premises in question when they entered. *United States v. James*, 528 F.2d at 1017; *Rodriguez v. Jones*, 473 F.2d at 666. Having such a reasonable belief, the agent's warrantless entry of the premises was proper. *United States v. Cravero*, 545 F.2d at 421. The fact that the fugitive named in the arrest warrant was not found to be present on the premises at the moment of entry does not render the entry invalid. *United States v. James*, 528 F.2d at 1017; *United States v. Hofman*, 488 F.2d 287, 289 (5th Cir. 1974).

Counsel refers this court to the cases of *Payton v. New York* and *Riddick v. New York*, recently we argued at the Supreme Court.[5] There, New York State statutes authorizing the entry of a suspect's home in the absence of exigent circumstances to effect the suspect's *warrantless arrest* are challenged as being violative of the fourth amendment. These cases, and the issue thus presented to the Supreme Court, are inapposite to the issue before this court today. Today, we apply the reasonable belief standard announced in *Cravero* where the entry occurs to execute an existing, valid arrest warrant.

[4] Gaultney and Steagald further argue that the refusal of the district court to order the government to provide their expert witness with a primary reference sample[6] for use in an independent laboratory analysis constitutes a denial of due process of law. This court has held that

> Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975). *See* F.R.Crim.P. 16(a)(1)(C). In cases involving a controlled substance, courts have held a concomitant part of the examination or inspection to be the right of the accused to have an independent chemical analysis performed on the seized substance. *See, e. g., United States v. Pollock*, 402 F.Supp. 1310, 1312 (D.Mass.1975); *United States v. Acarino*, 270 F.Supp. 526, 528 (E.D.N.Y.1967). *See also, United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978). Our inquiry, therefore, focuses on whether the refusal of the district court to order the government to provide the defendant's expert with a primary reference sample placed an unreasonable restriction on the defendant's right to an independent analysis so as to deny him due process of law.

The facts disclose that the parties agreed that the independent analysis of the seized substance would be conducted at the Georgia State Crime Laboratory [GSCL] in Atlanta, Georgia. The GSCL has and enforces a policy of not supplying visiting independent examiners with a primary reference sample of controlled substances. Testimony from a government witness stated that the GSCL adheres to this policy for three reasons. First, independent examiners who are licensed to possess controlled substances are allowed by law to possess their own primary reference samples. *See generally* 21 U.S.C. §§ 821-24; 21 C.F.R. § 1301; Ga.Code Ann. §§ 79A-813 to -816. Second, those independent examiners not so licensed can purchase "exempt standards"[7] from

5. The Court of Appeals of New York affirmed the defendants' convictions in these cases. *People v. Payton*, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978). On appeal, the United States Supreme Court noted probable jurisdiction 439 U.S. 1064, 99 S.Ct. 718, 58 L.Ed.2d 703 (1978). The cases were argued on March 26, 1979, 47 U.S.L.W. 3651 (U.S. April 3, 1979) and subsequently were restored to the calendar for reargument. — U.S. —, 99 S.Ct. 2049, 60 L.Ed.2d 658 (1979). The cases were reargued on Oct. 9, 1979. See 48 U.S.L.W. 3251 52 (U.S. Oct. 16, 1979); 48 U.S.L.W. 3267 (U.S. Oct. 23, 1979) (Nos. 78 5420, -54).

6. A primary reference sample is a sample of the drug in question, here cocaine hydrochloride, whose quality and purity are known.

7. An exempt standard is a mixture containing a controlled substance, here cocaine hydrochloride, that is prepared for laboratory, industrial, educational or special research purposes and is packaged in such a manner, combination, quantity, proportion, or concentration so as not to present a potential for abuse. *See* 21 C.F.R. §§ 1308.23-.24.

various private manufacturers. Third, various analytical chemistry techniques utilizing instruments available at the GSCL allow an analysis of an unknown compound without the use of a reference sample, either primary or exempt.

Gaultney and Steagald make no showing that the policy of the GSCL prevented their expert from conducting an independent analysis to show that the seized substance was not cocaine. The record indicates that the expert never availed himself of the opportunity to examine the seized substance to determine whether he could make an independent analysis of its contents. Despite never previously having attempted an analysis using an exempt standard, the expert testified that any tests he might run restricted by the GSCL guidelines would yield results inferior to those obtained by the government's tests. This contention was vigorously disputed by the testimony of the GSCL Senior Forensic Chemist. In light of this conflicting testimony, there was no error in the trial court's determination that the GSCL policies regarding primary reference samples are reasonable. They did not operate to deprive appellants of due process of law.

[5] Steagald additionally argues that the evidence produced at trial was insufficient to prove the requisite knowledge and intent to sustain his convictions. The evidence produced at trial shows that on September 16, 1977, Steagald contacted the Able-1 Answering Service in Atlanta, Georgia, to arrange a telephone answering service for the Rosen Import Company, Inc. A written agreement for such services was executed on behalf of Rosen Import Company by "G. K. Steagald (mgr.)." Able-1 subsequently received a check from Rosen Import Company, signed by G. K. Steagald, in payment for services rendered. On January 12, 1978, Steagald executed a lease agreement for warehouse space at 100-D Mill Street in Lawrenceville, Georgia. Steagald leased the warehouse in his own name and paid the first month's rent with a check drawn on the account of Rosen Import Company. On January 12, 1978, Bruce Duncan & Co., customs house brokers in Atlanta, Georgia, received a call from the Delta Airlines Airfreight Office [Delta] at Hartsfield International Airport in Atlanta, advising that Delta was holding a shipment of sixteen cartons of lamps and brass table bases from Colombia, South America, and were consigned to Rosen Import Company. Having handled previous Rosen Import Company shipments, Bruce Duncan & Co. was familiar with Steagald as a representative of that company and therefore called to advise him that this shipment had arrived. Steagald requested that Bruce Duncan & Co. arrange for delivery of the shipment for the next day because "his customers needed the products." Bruce Duncan & Co., acting on information furnished by Steagald, contacted Theatres Service Company [TSC] regarding the delivery of the shipment. On January 14, 1978, after contact with both Delta and Steagald, TSC delivered sixteen crates to the warehouse at 100-D Mill Street. Steagald paid the freight charges with a Rosen Import Company check, signed for the shipment, and received a copy of the freight waybill as his receipt.

Steagald argues that the evidence produced is consistent with the innocent activities of an importer and that the government's evidence, by failing to place him inside the Buford, Georgia, house, fails sufficiently to prove knowledge and intent. However, the government's evidence also showed that during the search of the Buford, Georgia, house, the copy of the TSC freight waybill received by Steagald upon delivery of the sixteen crates to the Mill Street warehouse was discovered on the dining room table. Additionally, agents found in the house two blank Rosen Import Company checks bearing the next two consecutive numbers to that on the check used by Steagald to pay the TSC freight charges. The evidence further showed that Steagald, when taken into custody, was wearing only slacks and a long-sleeve shirt, clothing inconsistent with the coldness of the January afternoon, and that once taken inside the

Buford, Georgia, house, told a DEA agent that he was cold and requested that she get a sweater or coat for him from the kitchen area. Moreover, on January 20, DEA agents obtained a search warrant for the warehouse located at 100-D Mill Street. There, agents discovered numerous wooden crates that had been opened previously and a large number of lamps and brass table bases. All the brass table bases were hollow inside. During the search agents discovered a bag of white powder, subsequently determined to be 483 grams of cocaine, 70% pure, inside one of the brass table bases.

[6] The sufficiency of the evidence to establish Steagald's knowledge and intent must be viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), with all credibility choices considered in support of the jury verdict. *United States v. Barresi*, 601 F.2d 193, at 195 (5th Cir. Aug. 22, 1979); *United States v. Black*, 497 F.2d 1039 (5th Cir. 1974). Applying this standard, there was sufficient evidence to support the jury's verdict.

[7, 8] Steagald further contends that the trial court committed reversible error when it failed to dismiss the indictment on grounds of double jeopardy. Steagald's first trial ended when, pursuant to his motion, the trial court declared a mistrial because of the publication of a prejudicial article in a local newspaper. Steagald claims that the prejudicial material in the article arose from a statement attributed to Gaultney and furnished to the press by the United States Attorney. Steagald argues that this action constitutes prosecutorial overreaching of such magnitude as to require application of the bar of double jeopardy. The law in this circuit was stated in *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976):

> [U]nder ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. . . . But the Supreme Court recognizes that there may be exceptions to that rule—rare cases involving circumstances which are "attributable to prosecutorial • • • overreaching." . . .
>
> Where "prosecutorial overreaching" is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. . . .
>
> . . . .
>
> To find "prosecutorial overreaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to reasonably conclude that a continuation of the tainted proceeding would result in a conviction.

530 F.2d at 1255–1256. This analysis must consider the totality of the circumstances prior to the mistrial in order to determine whether prosecutorial overreaching existed. *Id.* at 1256.

[9] Under *Kessler*'s test, the prosecutor's actions do not come close to prosecutorial overreaching. The record, as clarified by counsel during oral argument, shows that the transcript of Gaultney's statement that the prosecutor provided to the press contained no information that had not been introduced previously in the presence of the jury. Indeed, the United States Attorney's actions appear to have been motivated by a desire to ensure accuracy in the press's accounts. There was no error in the trial court's denial of Steagald's motion to dismiss the indictment on grounds of double jeopardy.

[10] Finally, Steagald contends that the trial court committed reversible error in its supplemental charge to the jury, first by refusing to recharge on specific intent and reasonable doubt and second by inaccurately defining intent by failing to refer to specific intent. A review of the supplemental charge to the jury, together with the court's original charge, discloses no error. The district court in its supplemental charge expressly cautioned the jury not to consider his supplemental charge in an iso-

lated context, but to consider the entire charge as given, ascribing no greater weight to the supplemental charge than to the original charge. In so doing, the district court took an appropriate and previously approved step to ensure a balanced charge so as to avoid any possibility of prejudice to the defendant. *United States v. Sutherland*, 428 F.2d 1152, 1157-58 (5th Cir. 1970), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972). Furthermore, the original and supplemental charges, when considered as combined charges, accurately cover the points of law at issue. *United States v. Blevins*, 555 F.2d 1236, 1239 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978).

The convictions of Hoyt A. Gaultney and Gary K. Steagald are

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

I respectfully dissent from that portion of the opinion relating to the entry and search of the premises.

United States v. Cravero, 545 F.2d 406 (5th Cir.), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), permitted, without a search warrant, the entry of premises of a third party for execution of an arrest warrant, based upon the officer's *reasonable belief* that the subject of the arrest warrant was within the building. The court reasoned that despite a lack of exigent circumstances, an officer who has already been to the magistrate once to secure the arrest warrant need not make an additional trip if he has determined that the suspect is within certain premises. 545 F.2d at 421.

In *Cravero* the officers personally had observed the subject enter the dwelling and, after maintaining surveillance for several hours, reasonably concluded that the subject was still within the house. Here, however, we are confronted with a different factual situation. The arresting officer had not observed Ricky Lyons, the subject of the arrest warrant. His belief that Lyons was within the premises was based solely upon an informant's tip. The informant had not seen Lyons on the premises,[1] but had merely heard his voice in the background during a telephone call from Jimmy, Lyons' companion, who stated that he and Lyons were at the location of a given telephone number. After matching the telephone number with a residence,[2] the officers, without first applying to a detached magistrate for a search warrant, proceeded to the premises where they detained the defendants and, after entering and looking through the rooms, discovered not the subject of the arrest warrant, but a cache of cocaine. As in *Cravero* there was an arrest warrant but no exigent circumstances; unlike *Cravero* the evidence linking the subject to the premises was extremely fragile and insufficient to justify an entry without a search warrant.[3]

In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court extended the *Terry* doctrine[4] to include a stop based not only on the policeman's observations but also on an informant's tip which did not satisfy the

1. Compare with *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973) where informant had observed the subject enter the building.

2. No address or name of resident was furnished by informant, but these were ascertained from the telephone company.

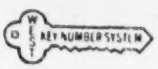
3. The circuits are not in accord on this issue. The Third Circuit, in *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 928 (3rd Cir. 1974), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976), held: "Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." However, the Tenth Circuit, citing *Cravero* as authority, affirmed denial of a motion to suppress in a case factually similar to the case before us. *United States v. Harper*, 550 F.2d 610 (10th Cir. 1977), *cert. denied*, 434 U.S. 837, 98 S.Ct. 128, 54 L.Ed.2d 99 (1977).

4. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Aguilar-Spinelli criteria.[5] *Adams* and *Terry* involved a minimal invasion of privacy, however, as compared with the greater intrusion occasioned by the search of a third party's private home. When an intrusion of such magnitude occurs, if not based upon the policeman's personal observation, nothing short of a full-fledged *Aguilar-Spinelli* tip should be acceptable.

Therefore, I would reverse the denial of the motion to suppress.

I concur with the remainder of the opinion relating to the other grounds of appeal.



UNITED STATES of America,
Plaintiff-Appellee,

v.

James D. ANDREW,
Defendant-Appellant.

No. 78-5770.

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1979.

Defendant was convicted in the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of violating federal criminal bank statutes and he appealed. The Court of Appeals held that: (1) there was no prejudice in trying defendant and codefendant together, and (2) trial court properly admitted into the evidence certain summary charts of one government witness.

Affirmed.

1. Criminal Law ⇐622(2)

Where each defendant testified and denied culpability in the case, there was no prejudice in trying the two defendants together on their charges of violating federal criminal bank statutes. 18 U.S.C.A. §§ 656, 1005; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

2. Criminal Law ⇐437

Although, in three instances out of nearly 200 times, witness was unable to testify positively that certain cash items at the bank were ultimately deposited on the same day in the defendant's checking account, trial court did not err in admitting into evidence certain summary charts of that government witness where the court's instructions to jury made it clear that the ultimate decision should be made by the jury as to the weight to be given to the evidence. Fed.Rules Evid. rules 401-403, 28 U.S.C.A.

Michael S. Tarre, (Court-Appointed), Miami, Fla., for defendant-appellant.

Hugh F. Culverhouse, Jr., Asst. U. S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

[1, 2] James D. Andrew appeals from his conviction on numerous counts of violating federal criminal bank statutes, to wit, 18 U.S.C. § 656, relating to theft, embezzlement or misapplication by bank officer or employee, and 18 U.S.C. § 1005, pertaining to making false entries in the bank's books. We have carefully considered the two points of error asserted on appeal by appellant Andrew and find them to be without merit. Appellant charges that there was error in the trial in district court because he was not granted a severance from his code-

5. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

court with directions to vacate the order of dismissal of the claim for monetary damages. We further direct the court to hold the claim in abeyance pending the administrative resolution of plaintiff's remaining claims.[17] *See Concordia v. United States Postal Service*, 581 F.2d 439, 444 (5th Cir. 1978).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH DIRECTIONS.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Hoyt Albert GAULTNEY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gary Keith STEAGALD,
Defendant-Appellant.

Nos. 78-5329, 78-5416.

United States Court of Appeals,
Fifth Circuit.

April 14, 1980.

Defendants were convicted before the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of drug offenses, and they appealed. The Court of Appeals affirmed, 606 F.2d 540. Petition for rehearing and petition for rehearing en banc were filed. The Court of Appeals held that knowledge of confidential informant's past reliability and precise method by which he gathered his information provided sufficient underlying circumstances from which government agent, who executed warrantless entry to execute search warrant could conclude that informant was reliable and that information he furnished as to location of fugitive was credible.

Petition for panel rehearing granted in part and denied in part.

Petition for rehearing en banc denied.

Kravitch, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⇐394.6(5)

Where information leading to formulation of police officer's reasonable belief is supplied by a confidential informant, a defendant at a motion to suppress hearing may challenge the validity of the information under *Aguilar* and *Spinelli*.

2. Arrest ⇐63.4(8)

In case of warrantless entry based on information supplied by an informant, the inquiry at a suppression hearing is simple and straightforward: here the officers who decided to act on the information supplied by the confidential informant aware at the time they chose to act of "underlying circumstances" making the informant "reliable" and his information "credible."

hold the claim in abeyance, we eliminate needless guessing, and if we have erred, it is on the side of caution.

17. Although "practical notions of judicial efficiency" dictate that plaintiff's damage claim be held in abeyance, we are concerned about the delay and inconvenience which this procedure may entail. At oral argument counsel for defendant-appellee indicated that a hearing before the ABCMR was scheduled for January 9, 1980, and that a decision would follow within two or three months. We do not know whether this hearing has taken place, or whether one is currently scheduled. In view of the fact that plaintiff's case has already been pending before the ABCMR for two years, we feel that some time limit should be placed on our stay of plaintiff's claim for damages. We therefore place a July 1, 1980 expiration date on our order to hold plaintiff's claim in abeyance. If the ABCMR has not rendered a decision in plaintiff's case by that date, the district court should set down plaintiff's damage claim for trial at the earliest convenient time.

3. Arrest ⇐63

Where confidential informant's record of reliability was known to officer and officer was aware that informant had known alleged fugitives for a number of years and had been given telephone number where fugitives could be reached within next 24 hours and that during a subsequent telephone conversation with one of them informant had heard the other's voice in background, knowledge of past reliability and method by which informant got his information provided sufficient underlying circumstances from which officer, who relied on informant's statements in making warrantless entry to execute arrest warrant, could properly conclude that informant was reliable and his information credible.

Albert M. Horn, J. Richard Young, Asst. Public Defender, Atlanta, Ga., for defendant-appellant.

Robert A. Boas, Asst. U. S. Atty., Atlanta, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Northern District of Georgia.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

[Opinion Nov. 13, 1979, 606 F.2d 540 (5th Cir. 1979)]

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

PER CURIAM:

[1-3] The decision of this panel in these actions appears at 606 F.2d 540 (5th Cir. 1979). On petition for panel rehearing, the majority opinion is modified by inserting the following paragraph after the thirteenth line, in the first column, on page 545:

Where the information leading to the formulation of the officer's reasonable belief is supplied by a confidential informant, a defendant at a motion to suppress hearing may challenge the validity of the information under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *See generally Rodriguez v. Jones*, 473 F.2d 599, 605-06 n.3 (5 Cir.), cert. denied, 412 U.S. 953, 93 S.Ct. 323, 37 L.Ed.2d 1007 (1973). The inquiry to be made is simple and straightforward: Were the officers who decided to act on the information supplied by the confidential informant aware at the time they chose to act of "underlying circumstances" making the informant "reliable" and his information "credible"? The record discloses that Agents Rassey and Goodowens were aware of such underlying circumstances. The confidential informant's record of past reliability was known to Agent Rassey and is unchallenged by appellants' counsel. *See* note 2, *supra* at 542-43. Additionally, Agent Rassey was aware that the informant had known both "Jimmy" and Ricky Lyons for a number of years, that the informant had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977, that the informant on January 14, 1978, had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours, and that during a subsequent telephone conversation with "Jimmy" the confidential informant had heard Ricky Lyons' voice in the background. Agent Rassey passed much of this information along to Agent Goodowens. The knowledge of both the confidential informant's past reliability and the precise methods by which he gathered his information in this case provided sufficient underlying circumstances from which the agent properly could conclude that the informant was reliable and the information he supplied was credible.

In all other respects, the petition for panel rehearing is DENIED.

A member of the court in active service having requested a poll on the reconsideration of these causes en banc, and a majority

of the judges in active service not having voted in favor of it, the petition for rehearing en banc is DENIED.

KRAVITCH, Circuit Judge, dissenting:

I disagree with the majority that the tenuous information appended to the panel opinion satisfies the teachings of *Aguilar* and *Spinelli*. The more important problem, however, is the extension of the rule announced in *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties.

INDUSTRIAL INDEMNITY, INC., Plaintiff-Appellant,

v.

Moon LANDRIEU, Secretary of the Department of Housing and Urban Development of the United States of America, Defendant-Appellee.

No. 79-2748
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

April 14, 1980.

Building contractor's surety and assignee brought suit against the Secretary of Housing and Urban Development seeking payment for construction work on a housing project insured by the Secretary under a program authorized by the National Housing Act. The United States District Court for the Northern District of Texas, Robert W. Porter, J., dismissed for lack of subject-matter jurisdiction. Surety and assignee appealed. The Court of Appeals held that the National Housing Act waived sovereign immunity and federal question jurisdiction existed.

Reversed and remanded.

Federal Courts ⇐232
United States ⇐53(14)

National Housing Act waived sovereign immunity and authorized suit by building contractor's surety and assignee for payment for construction work on housing project insured by Secretary of Housing and Urban Development under program authorized by Act; federal question jurisdiction existed. National Housing Act, § 1 as amended 12 U.S.C.A. § 1702; 28 U.S.C.A. § 1331(a).

Baker & Botts, Richard K. Willard, Ralph S. Carrigan, Houston, Tex., for plaintiff-appellant.

Gwynn T. Swinson, Dept. of Justice, Civil Div., Commercial Litigat., Washington, D. C., for HUD.

Locke, Purnell, Boren, Laney & Neeley, Harriet E. Miers, Dallas, Tex., for Metropolitan.

Haynes & Boone, Robin P. Hartmann, Dallas, Tex., for Home Savings.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

In 1971, the Secretary of the Department of Housing and Urban Development (HUD) issued a commitment to insure a $2,143,000 mortgage for the construction of the Casa Claire apartment project in Mesquite, Texas, pursuant to § 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715*l*(d)(4) (1976). Section 221(d)(4) is a program of mortgage insurance enacted by Congress to "assist

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

FOURTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE 4 OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * *

(c) Form.

(1) Warrant. The warrnat shall be signed by the magistrate and shall contain the name of the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

* * *

(d) Execution or Service; and Return.

* * *

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest but upon request he shall show the warrant to the defendant as soon as

possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

* * *

RULE 41 OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only to an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the

federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. (emphasis supplied).

No. 79-6777

In the Supreme Court of the United States

OCTOBER TERM, 1980

GARY KEITH STEAGALD,

Petitioner

—*v.*—

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

WADE H. MCCREE, JR.
Solicitor General

JOHN RICHARD YOUNG
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(404) 522-0400

Counsel for Petitioner

PATTY MERKTAMPT STEMLER
Criminal Division
Department of Justice
Washington, D.C. 20530
(202) 633-3965

Counsel for Respondent

PETITION FOR CERTIORARI FILED JUNE 13, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

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SUMMARY OF RELEVANT DOCKET ENTRIES

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1/24/78	Criminal Indictment in three counts, filed	1
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2/6/78	Defendant Smith: Defendant's Amended Motion and Brief to Suppress for Unlawful Search, filed	17
2/14/78	Defendant Steagald: Defendant's Motion and Brief to Suppress, filed	20
2/16/78	Defendants Gaultney, Gaultney and Smith: Submitted to U.S. Magistrate on Defendants' Motion to Suppress (of 2/1/78)	21
2/22/78	Defendant Smith: Motion to Suppress, as amended 2/6/78 and 2/16/78, submitted to U.S. Magistrate	25
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3/13/78	All defendants: Government's Response and Brief to Defendants' Motion to Suppress, filed	36
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	Defendants Gaultney and Gaultney: Defendant's Exceptions to Magistrate's Report and Recommendation on Motion to Suppress, filed	58

Date	Description of Document or Proceeding	Doc. No.
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. CR78-20 A

UNITED STATES OF AMERICA

v.

HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD

CRIMINAL INDICTMENT—Filed Jan. 24, 1978

THE GRAND JURY CHARGES:

COUNT ONE

That, on or about the 18th day of January, 1978, within the Northern District of Georgia, the defendants, HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH and GARY KEITH STEAGALD, did unlawfully and knowingly possess with the intent to distribute a Schedule II controlled substance, that is, a quantity of cocaine hydrochloride, in violation of Title 21 United States Code, Section 841(a)(1).

COUNT TWO

That, beginning at a date unknown to the Grand Jury and continuing up to and including January 18, 1978, in the Northern District of Georgia, the defendants, HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD did knowingly and unlawfully combine, conspire, confederate and agree, and have a tactic understanding with one another and with other persons whose names are to the Grand Jury unknown, that they

would commit various criminal offenses against the laws of the United States of America, in violation of Title 21, United States Code, Section 846, that is:

To knowingly, intentionally and unlawfully possess with the intent to distribute, and to distribute, large quantities of cocaine hydrochloride, a Schedule II controlled narcotic substance, in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects and purposes thereof, the defendants committed various overt acts within the Northern District of Georgia and elsewhere, including, but not limited to, the following:

1. On or about January 13, 1978, defendant HOYT ALBERT GAULTNEY caused a shipment of brass tables and lamps, some of which contained cocaine hydrochloride, to be picked up at Hartsfield International Airport, Atlanta, Georgia.

2. On or about January 18, 1978, in Gwinnett County, Georgia, defendants, HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD knowingly and intentionally possessed with the intent to distribute approximately 45 pounds of cocaine hydrochloride, a Schedule II controlled substance.

COUNT THREE

That, on or about the 11th day of January, 1978, within the Northern District of Georgia, the defendant HOYT ALBERT GAULTNEY did knowingly, wilfully, and unlawfully import and cause to be imported into the customs territory of the United States from a place outside thereof, to wit, Gogota, Colombia, South America, a

quantity of cocaine hydrochloride, a Schedule II controlled narcotic substance, in violation of Title 21, United States Code, Section 952(a).

A TRUE BILL

/s/ [Illegible]
Foreman

WILLIAM L. HARPER
United States Attorney

/s/ Robert A. Boas
ROBERT A. BOAS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. CR 78-20 A

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD, DEFENDANTS

MAGISTRATE'S REPORT AND RECOMMENDATION UPON DEFENDANTS' MOTIONS TO SUPPRESS AND TO DISMISS—Filed April 7, 1978

Defendants Hoyt Albert Gaultney, Kathy Renee Gaultney, James Albert Smith, and Gary Keith Steagald have been charged in a three-count indictment in this case with violations of the federal drug laws. Counts One and Two charge all four defendants with conspiracy to possess with intent to distribute and the possession with intent to distribute of cocaine in violation of 21 U.S.C. §§ 841 (a)(1) and 846. Count Three charges defendant Hoyt Albert Gaultney with the importation of cocaine in violation of 21 U.S.C. § 952(a). They have filed motions to suppress evidence and to dismiss the indictment. Pursuant to 28 U.S.C. § 636(b) and this Court's Local Rule 290, these motions have been heard by the undersigned Magistrate, who now submits the following report and recommendation as to disposition.

MOTION TO SUPPRESS

On the afternoon of January 18, 1978, federal Drug Enforcement Administration (D.E.A.) Agents Kelly Goodowens, Wayne Smith and James Williams, assisted

by other D.E.A. agents and state officers, went to premises located at 6291 Cary Court, Buford, Gwinnett County, Georgia, in an effort to locate and arrest one Richard Harrison Lyons, a/k/a "Ricky" Lyons, for whom an arrest warrant had been issued by the United States District Court for the Southern District of Georgia on July 14, 1977, on the basis of an indictment charging Lyons with violations of the federal drug laws. (Tr. Vol. I, pp. 16-19, 20-25, Govt. Ex. 1). Two days earlier, on January 16, 1978, Agent Goodowens had been advised by D.E.A. Agent Joseph Rassey that on January 14, 1978, he had received information from a reliable confidential informant of his that Lyons and another individual named "Jimmy" using the alias "Carl James", who he believed to be wanted on state drug charges in Georgia, could be located within the next twenty-four hours or so at telephone number 404-945-3773 in the Atlanta, Georgia, area. Agent Goodowens determined from the telephone company that the number (404-945-3773) was listed to a Richard Fisher, 6291 Cary Drive, Buford, Gwinnett County, Georgia. After trying unsuccessfully to locate this address, Agent Goodowens again contacted the telephone company and found out that the correct address was 6291 Cary *Court* and obtained detailed directions on how to find it. (Tr. Vol. I, pp. 16-20, Vol. II, pp. 36-38). On January 18, 1978, Agent Goodowens was advised by Agent Rassey that he had had several other conversations with his confidential informant between January 16-18, 1978, and was told each time, the last being on the morning of January 18, that Lyons and "Jimmy" were still at that telephone number and that there would be four or five people at that location. (Tr. Vol. II, pp. 38-39, 42, 49).

Upon arriving at the premises at 6291 Cary Court, Agents Goodowens and Smith noticed two men in the vicinity of a Volkswagen parked in the driveway. These two men were subsequently identified as defendants Hoyt Albert Gaultney and Gary Keith Steagald. Agent Smith

at first thought defendant Gaultney was Ricky Lyons, but upon learning that he was not continued on to the house and knocked on the front door. Defendant Kathy Gaultney answered the door and, after being advised by Agent Smith that he was a police officer with an arrest warrant and asked whether he could come in, admitted him. After being admitted, Agent Smith told her the arrest warrant was for Ricky Lyons and asked whether he was in the house. Mrs. Gaultney stated that she did not know who Ricky Lyons was and that there was no one by that name in the house. Agent Smith directed Mrs. Gaultney to place her hands on the wall and asked another officer, Detective Conway, to watch her while he checked the house for Lyons. (Tr. Vol. I, pp. 24-26; Vol. II, pp. 55-57, 77). Upon entering a front bedroom, Agent Smith observed a set of triple beam balance scales and a clear plastic bag containing white powder on a small sewing-type table. (Tr. Vol. II, pp. 59-60; Govt. Ex. 3). Based on his experience as a narcotics officer, Agent Smith immediately suspected this white powder to be some kind of controlled substance, probably cocaine, and after checking the rest of the house and not finding Lyons, he went back outside the house and advised Agent Goodowens of what he had seen. (Tr. Vol. II, pp. 60-62). Agent Goodowens immediately entered the house and went to the bedroom where he observed the scales and suspected cocaine on the small table as well as a suitcase lying open on the bed containing more clear plastic bags full of what appeared to be cocaine. (Tr. Vol. I, pp. 31-33; Govt. Ex. 3A).[1] Defendants Hoyt Gaultney and Gary Steagald were then brought into the living room area of the house where Mrs. Gaultney was being detained and Agent Smith left to drive to Atlanta to obtain a search warrant for the house. (Tr. Vol. II, pp. 63-64).

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[1] Agent Smith did not see the cocaine in the open suitcase on the bed.

After defendant Hoyt Gaultney had been in the house for a short while, he called D.E.A. Agent James Williams over and asked to talk with him. Agent Williams took defendant Gaultney back to the left back bedroom in order to talk to him in private, advised him of his Miranda rights, and made arrangements to tape record his statement. While this was going on, Agent Goodowens conducted a search of the bedroom for weapons during which he removed a small gray suitcase from a shelf inside a closet. Upon opening the suitcase, Agent Goodowens observed what appeared to be drug paraphenallia, so he removed the suitcase from the room. (Tr. Vol. I, pp. 36-37; Vol. III, pp. 4-7, 33-34). Defendant Gaultney told Agent Williams that there were fifty pounds of cocaine in the house and led him to the right front bedroom where he pointed out a brown suitcase in a back corner of the room which he said contained the cocaine. (Tr. Vol. III, p. 8).

While the agents were awaiting word from Agent Smith that a search warrant for the house had been obtained, the telephone rang on several occasions. In one of these calls, which occurred at about 7:25 p.m., a male identifying himself as "Jimbo[y]", asked for "Al" or "Cat Woman". Upon being told by Agent Goodowens, who did not identify himself, that they were outside at the time, this person stated that he would be arriving at the house in about five minutes. Hearing Agent Goodowens tell his fellow officers that "Jimbo[y]" would be arriving shortly, defendant Gaultney volunteered that "Jimbo[y]" would probably be carrying a gun and would not hesitate to use it under the right circumstances and requested that the agents allow him to move away from his present location, which was apparently in line of fire from the front door. Based upon Gaultney's statement that "Jimbo[y]" was staying there and the fact that they had found a traffic ticket lying on a table in the house in the name of "Carl Ray James", the D.E.A. agents thought that "Jimbo[y]" might be the same per-

son identified by Agent Rassey's informant as the state fugitive known as "Jimmy". (Tr. Vol. I, pp. 100-101; Vol. II, p. 7).

During this time, Agent Smith had appeared before United States Magistrate J. Owen Forrester and obtained a search warrant for the Cary Court residence. Agent Smith testified that Magistrate Forrester signed the search warrant around 7:30 p.m. and immediately thereafter, he, Agent Smith, telephoned his fellow agents at the Cary Court premises to advise them that the search warrant had been signed.[2] Agent Smith then left the courthouse with the search warrant, stopped for something to eat, and arrived back at the Cary Court premises around 9:00 p.m. (Tr. Vol. II, pp. 66-67).

Around 7:30 p.m., while Agent Smith was on the phone and advising the agents at the premises that the search warrant had been issued, defendant James Albert Smith and his wife arrived at the premises in a pickup truck. Upon entering the house, defendant Smith was "frisked" and found to be in possession of a handgun. He produced a driver's license in the name of "Carl Ray James" but refused to identify himself any further than by giving the name "Jimmy". Defendant Smith and his wife were then taken to the living room with the other defendants and Agent Goodowens checked the pickup truck to determine if there were any other persons in it. (Tr. Vol. I, pp. 104-108; Vol. II, pp. 7, 21-23).

About 7:45 p.m., after having been advised by Agent Smith that a search warrant for the premises had been

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[2] Although the warrant contains a notation on it in the Magistrate's handwriting of 8:00 p.m., Judge Forrester himself recalled at the hearing that he "would have felt certain that it was earlier than eight o'clock." (Tr. Vol. II, p. 31). In any event, since Judge Forrester also recalled that Agent Smith made a telephone call right after the warrant was signed (Tr. Vol. II, p. 32), and since Agent Goodowens testified that the house was not searched until after Agent Smith had called advising that the warrant had been signed (Tr. Vol. I, p. 35) this discrepancy does not effect the validity of the search.

obtained, the agents executed the search warrant and seized, inter alia, the brown suitcase pointed out by Gaultney and containing approximately forty-four pounds of cocaine. (Tr. Vol. I, p. 93; Govt. Ex. 4).

When Agent Smith returned to the house with the search warrant around 9:00 p.m., he learned from the other agents about the arrival of the pickup truck and its occupants and about defendant Smith's refusal to identify himself. He also spoke to Mr. Richard Fisher, the owner of the residence who had arrived, who told him that defendants Smith had rented the premises from him using the name "Jim Travis". Since it was believed that "Jimmy" was wanted by state authorities, Agent Smith attempted to get further information on defendant Smith from the G.B.I., but was unsuccessful. In an attempt to determine who defendant Smith really was, Agent Smith went outside to the pickup truck and looked through it, hoping to find some indication of his true identity. He did not find anything in the glove compartment, but in the cab of the truck, behind the front seat, he found a brown briefcase, which he brought inside the house. Although there was nothing inside the briefcase showing who "Jimmy" really was, it did contain several kinds of illegal drugs and polaroid photographs of what appeared to be bales of marihuana and the bags of cocaine found inside the house. Agent Smith then seized the briefcase and its contents as suspected contraband and potential evidence in the case. The truck was also seized on the basis of the contraband found in the briefcase. Defendant Smith was not finally identified until later that evening at the D.E.A. office. (Tr. Vol. II, pp. 23, 68-70, 96-97).

Defendants Hoyt Gaultney, Kathy Gaultney, James Albert Smith and Gary Keith Steagald were subsequently transported to Atlanta and charged on the basis of the cocaine seized in the searches. Subsequently, on January 19, 1978, a second search warrant (Govt. Ex. 6) was obtained for the Cary Court residence and executed.

(Tr. Vol. I, pp. 39-41). On January 20, 1978, a search warrant was obtained for a warehouse located on Mills Street in Lawrenceville, Georgia (Govt. Ex. 7), and executed. (Tr. Vol. III, pp. 14-15). Finally, on January 24, 1978, a search warrant was obtained for a warehouse in College Park, Georgia (Govt. Ex. 8), and thereafter executed (Tr. Vol. II, pp. 70).

In claiming that the above searches and seizures by the D.E.A. agents were illegal, defendants first contend that the initial entry by the agents into the Cary Court premises on January 18, 1978, was illegal. Defendants argue that the entry was not pursuant to a valid search warrant nor was it justified by exigent circumstances requiring a warrantless entry. The government argues that the D.E.A. agents' initial entry into the Cary Court premises was legal because it was made for the purpose of executing a valid outstanding arrest warrant for Richard Harrison "Ricky" Lyons, who the Agents reasonably believed to be inside the premises.

As noted by the government in its brief, recent case law in this Circuit has made it clear that an entry to execute an arrest warrant is an exception to the requirement of a search warrant to intrude into a home and that there need not be a showing of exigent circumstances in order to validate such an entry. All that is required before an officer may execute an arrest warrant at the home of a third person is a "reasonable belief" by the officer that the person sought is within the premises to be entered. *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977); *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976); *Rodriguez* v. *Jones*, 473 F.2d 599, 605-06 (5th Cir. 1973), *cert. denied*, 412 U.S. 953. It is undisputed that at the time of entry, January 18, 1978, there was a valid outstanding federal arrest warrant for Ricky Lyons from the United States District Court for the Southern District of Georgia based upon an indictment for alleged drug violations. Moreover, it is clear that both Agent Goodowens and Agent Smith

were fully aware of the existence of this warrant. The fact that they did not have the warrant, or a copy thereof, in hand when they went to the Cary Court premises to arrest Lyons is of no significance. Rule 4(d)(3), Federal Rules of Criminal Procedure; *Barber* v. *United States*, 412 F.2d 775 (5th Cir. 1969); *United States* v. *Leftwich*, 461 F.2d 586 (3d Cir. 1972), *cert. denied*, 409 U.S. 915. Accordingly, the question here is whether, at the time of entry, the facts and circumstances within the agents' knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man to "reasonably believe" that Ricky Lyons was inside the Cary Court premises.

From the evidence presented, the Magistrate is satisfied that the officers had sufficient facts and circumstances to "reasonably believe" that Ricky Lyons was in the Cary Court premises and that their entry into the premises was lawful and justified. They had received information from D.E.A. Agent Rassey that a confidential reliable informant of his had advised that Lyons and a state fugitive known as "Jimmy" would be staying at an address in the Atlanta, Georgia, area with telephone number 404-945-3773. Agent Goodowens had traced that phone number to 6291 Cary Court, Buford, Gwinnett County, Georgia. Agent Rassey testified that he had known the informant for four to five years and that he had received reliable information from him several times during that period, particularly during the last eighteen months. He also testified that information provided by this same informant had led to at least seven arrests for drug-related offenses, with three of those cases resulting in convictions and the other four still pending. (Tr. Vol. II, pp. 35-36, 51-52). Agent Rassey stated that the informant advised me he had known both Lyons and the state fugitive named "Jimmy" for several years. He stated that on January 14, 1978, the informant advised that he had talked with "Jimmy" by telephone and had been given the telephone number in the Atlanta

area where he and Ricky Lyons could be reached within the next twenty-four hours or so. Agent Rassey further testified that on January 16, 1978, the informant stated he had had a recent conversation with "Jimmy", who was then at the telephone number and that he knew Ricky Lyons was at the same location because he could hear his, Lyons', voice in the background. Agent Rassey further stated that the informant told him on the morning of January 18, 1978, that "Jimmy" and Lyons were still at that telephone number and that several other people would be with them at the location. This information was given by Agent Rassey to Agent Goodowens on January 18, 1978. (Tr. Vol. II, pp. 36-38, 39, 42, 49). Thus, the informant information clearly met the "two-prong test" of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969). Not only had this information come from a source of proven reliability, but the agents were entitled to regard it as credible because they knew it was based on recent, first-hand communication between the informant and the fugitives. The fact that neither Lyons nor "Jimmy" were actually in the premises at the time of the entry does not render it invalid. *United States* v. *Hofman*, 488 F.2d 287 (5th Cir. 1974); *United States* v. *James*, 528 F.2d 999, 1017 (5th Cir. 1976). *See also*, *United States* v. *Harper*, 550 F.2d 610 (10th Cir. 1977), a case similar to the instant case.

Having concluded that the agents' entry into the Cary Court premises was lawful, the Magistrate must also conclude that their observing and subsequent seizure of the cocaine on the front bedroom sewing table (Govt. Ex. 3) and that lying in the open suitcase on the bed in that room (Govt. Ex. 3A) was justified and lawful under the "plain view doctrine". Any evidence in open and plain view that officers come across in the course of a lawful investigation which they observe to be incriminating may be lawfully seized. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Harris* v. *United States*, 390 U.S. 234

(1968); *United States* v. *Hilstrom*, 533 F.2d 209 (5th Cir. 1976); *United States* v. *Woods*, *supra*. Likewise, the closed suitcase full of cocaine in the front bedroom and other evidence found during the search pursuant to the search warrant issued by Judge Forrester were lawfully seized. As pointed out by the government, the only attack made by defendants here is that the warrant was based on information received as a result of an illegal entry into the premises.

The removal, opening and search and seizure of the gray suitcase from the back bedroom closet by Agent Goodowens presents a different situation. Although the contents of the suitcase were not actually seized until after the search warrant for the house had been obtained, the government admits that this bag was in fact illegally searched before the warrant was issued and has stated that it does not intend to introduce the suitcase, the *Mannitol* or any other items contained in the suitcase at the trial of this case. This evidence should be suppressed

The Magistrate is of the further opinion that the search of defendant Smith's truck and the seizure of his briefcase without a warrant was violative of the Fourth Amendment's protection against unreasonable searches and seizures. The government concedes this search does not fall within one of the recognized exceptions to the warrant requirement of the Fourth Amendment. The government attempts to justify the search of defendant Smith's truck and seizure of items therefrom on the ground that it was reasonable and necessary in view of the fact that defendant Smith had persisted in refusing to give the agents his true name. The case of *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972), *reh. denied*, 471 F.2d 750, cited by the government does not support its contention that the search of the pickup truck in this case was reasonable. That case concerned the seizure of a weapon during a "precautionary" search of a vehicle before the driver was allowed to return to his vehicle. As pointed out by defendant, there was no real

justification for an immediate need for defendant Smith's true identity as he was under arrest and was subsequently transported to Atlanta where his true identity was established. Accordingly, the Magistrate must conclude that the search of the pickup truck and seizure and subsequent search of the briefcase were illegal and all items and evidence obtained therefrom should be suppressed.

Finally, as in the case of the January 18, 1978, search warrant for the Cary Court premises (Govt. Ex. 4), the only attack made by defendants upon the other search warrants issued in this case (Govt. Ex. 6, 7 and 8) is that said warrants were based on information obtained as a result of the illegal initial entry into the Cary Court premises and are invalid under the "fruit of the poison tree" doctrine. Therefore, the Magistrate having concluded that the initial entry into the Cary Court premises was not illegal must also conclude that these warrants were based on information received as a result of a lawful entry into the premises and are lawful and valid search warrants.

MOTION TO DISMISS

The defendants have moved to dismiss the indictment due to improper selection of grand and petit jurors, alleging that the plan for jury selection in this District and this Division and the implementation thereof by the Clerk substantially fails to comply with the provisions of the Jury Selection and Service Act and the requirements of the Fifth and Sixth Amendments. An identical motion based upon the same grounds was denied by this Court by Order dated February 2, 1978, in the case of *United States* v. *Roosevelt Warren, et al.*, Criminal Action No. CR76-371A. At the hearing before the Magistrate, defendants agreed that since the instant motion was identical to the motion in *United States* v. *Warren, supra*, and that their evidence and arguments would be

the same as in that case, it would be unnecessary for the Court to further hear the motion and agreed that the Court could determine the merits of the motion based on the record in *United States* v. *Warren*. Accordingly, for the reasons stated in the Court's opinion in *United States* v. *Warren*, a copy of which is attached hereto, it is recommended that the defendant's motion to dismiss be overruled and denied.

RECOMMENDATION

For the foregoing reasons, it is recommended that defendant's motion to suppress be overruled and denied except as to the gray suitcase and its contents which Agent Goodowens found in the back bedroom of the Cary Court premises on January 18, 1978, while Agent Williams was talking to the defendant Hoyt Gaultney and, the briefcase and its contents and other items seized from the pickup truck belonging to defendant Smith, which items should be suppressed. Defendants' motion to dismiss the indictment due to improper selection of grand and petit jurors should be denied.

AND IT IS SO RECOMMENDED this 6th day of April, 1978.

/s/ Allen L. Chancey, Jr.
ALLEN L. CHANCEY, JR.
United States Magistrate

[R, Vol. II, p. 3] PROCEEDINGS

THE COURT: Are the parties ready in the case of the United States against Catherine (Cathy) Renee Gaultney, James Albert Smith and Gary Keith Steagald?

MR. BOAS: Government is ready, Your Honor.

MR. YOUNG: As far as Mr. Steagald is concerned, there are two motions I filed on Friday. Subject to ruling on those motions, I am prepared for Mr. Steagald.

MR. JENKINS: Subject to one motion which was still pending the last time the case came up, which is a motion in limine, which is a short matter, I believe we're ready for trial for Mr. Smith.

MR. HORN: Your Honor, we are ready for trial. We do renew all of our motions previously made on behalf of Cathy Gaultney.

THE COURT: You better outline them so I will know what they are.

MR. HORN: The principal one is the motion to suppress and at all times we object to the evidence and testimony of the government, since it was all obtained as a direct result of what we believe to be an unlawful intrusion [R, Vol. II, p. 4] and followup from that unlawful intrusion.

The independent lab analysis, Your Honor, we're already taken that up in the other matter and we stand on our position in that.

Those are the only two of any consequence, Your Honor.

THE COURT: All right. The Defendant Steagald renewal of his motion for judgment of acquittal is overruled and denied.

Defendant Steagald motion to dismiss the indictment is overruled and denied.

Now, the motion to suppress was heard at the last trial, was it not?

MR. HORN: Well, we renewed it. It was heard initially by the magistrate and Your Honor confirmed his rulings on our exceptions.

THE COURT: Is there a need for me to go through that again at this trial? Can I simply make the same ruling on the same evidence?

MR. JENKINS: As far as Mr. Smith is concerned, as long as the Court is aware that we renewed it and the Court is going to rule the same way, I don't see any point in arguing it again.

MR. YOUNG: For the record, Your Honor, * * *

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 78-5329, 78-5416

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOYT ALBERT GAULTNEY, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY KEITH STEAGALD, DEFENDANT-APPELLANT

OPINION—Filed Nov. 13, 1979

Appeals from the United States District Court
for the Northern District of Georgia

Before THORNBERRY, CLARK and KRAVITCH, Circuit Judges.

CHARLES CLARK, Circuit Judge:

Hoyt A. Gaultney and Gary K. Steagald were convicted of possessing cocaine in violation of 21 U.S.C. § 841 (a) (1), and with conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 846. Additionally, Gaultney was convicted of the unlawful importation of cocaine in violation of 21 U.S.C. § 952 (a). They appeal, raising a variety of issues. We affirm.

Gaultney and Steagald argue first that the original entry by local police and federal agents into the premises in which cocaine was subsequently found was unlawful,

in that the entry was neither pursuant to a search warrant nor justified by probable cause and exigent circumstances. The evidence shows that on January 4, 1978, Special Agent Joseph Rassey of the Federal Drug Enforcement Administration [DEA] in Detroit, Michigan, was contacted by a confidential informant. The informant advised that he might be able to locate "Ricky Lyons," whom he believed to be wanted by the DEA, and another individual named "Jimmy," whom he believed to be wanted on state drug charges in Georgia. The informant advised that "Jimmy" currently was using the alias "Carl James." Additionally, the informant stated that he had known both of these individuals personally.[1] Agent Rassey did not know the status of either individual, but because this informant's information had been reliable in the past,[2] Rassey told the informant to call as soon as the individuals were located at a definite spot. On Saturday evening, January 14, 1978, Rassey received a telephone call from the informant advising that he had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours.[3] The informant gave this tele-

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[1] Special Agent Rassey testified that the confidential informant had known "Jimmy" and Ricky Lyons for a number of years and had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977.

[2] Special Agent Rassey testified that he had known the informant for approximately four or five years, that the informant had furnished reliable information to the DEA in the past, and that on the basis of such information seven drug-related arrests had occurred. Rassey further testified that three convictions had been obtained in those cases and that four cases were pending. Counsel for Gaultney admitted at oral argument that the past reliability of the confidential informant was not at issue.

[3] Special Agent Rassey testified that: "On the day the informant called me and said he had received a phone number from Jimmy, and it was a number where Jimmy and Ricky were going to be within the next twenty-four hours."

phone number to Rassey, who, in turn, gave it to Special Agent Kelly Goodowens of the DEA's Savannah, Georgia, District Office on Monday, January 16. Goodowens was aware that one Richard Harrison Lyons, a/k/a "Ricky" Lyons, had been indicted six months earlier in the Southern District of Georgia, in a marijuana smuggling case. Upon further investigation, Goodowens determined that an arrest warrant had been issued for Lyons and that the DEA still listed Lyons as a fugitive. Thereafter, Goodowens contacted the telephone company and learned that the telephone number provided by Agent Rassey's informant was listed to a Richard E. Fisher at a rural address in Buford, Georgia.

On Monday, January 16, 1978, Rassey received another telephone call from his informant, who advised that a recent telephone conversation with "Jimmy" confirmed his presence at the telephone number previously given Rassey by the informant. The informant also stated that Ricky Lyons was at the same location, noting that he had heard Lyon's voice in the background during his telephone conversation with "Jimmy." Rassey had several other telephone conversations with the informant between January 16 and the morning of January 18. Each time the informant confirmed that "Jimmy" and Ricky Lyons were still at the location of the telephone number. The informant also advised Rassey that several other people would be with Lyons at the location. This information was passed along to Goodowens by Rassey in a series of telephone conversations, the last taking place on the morning of Wednesday, January 18, 1978.

On the afternoon of January 18, Goodowens and DEA Agents Wayne Smith and James Williams, after consulting with a telephone company installer and local police, located the address to which the telephone number was listed. On driving past the house, these agents observed a Volkswagen parked in the driveway and smoke coming from the chimney of the house. No people were observed outside in the vicinity of the house or

automobile. Approximately thirty minutes later, after coordinating plans for the execution of the arrest warrant on Ricky Lyons, Agents Goodowens, Smith, and Williams led a force of approximately twelve federal agents and local police officers to the residence. Upon approaching the house, Goodowens and Smith noticed two men located near the rear of the parked Volkswagen, which now had its engine cover up. Smith at first believed one of the men to be Ricky Lyons, but, upon realizing he was not, continued toward the house. One of the two men, later identified as Gaultney, was armed. Both Gaultney and the other man, later identified as Steagald, were detained pending Smith's return from the house.

Agent Smith arrived at the house and knocked on the front door. Gaultney's wife, Cathy, answered the door. Smith advised Mrs. Gaultney that he was a police officer with an arrest warrant. He asked to come into the house and was admitted. Smith told Mrs. Gaultney he had an arrest warrant for Ricky Lyons and asked if Lyons was in the house. Mrs. Gaultney stated that there was "no one by that name" in the house. Smith then told Mrs. Gaultney to place her hands on the wall and asked Detective Conway to watch her. Smith began a sweep search of the premises.

Agent Smith walked down a short hall to his right and looked first in a bathroom situated between two bedrooms. Seeing no one in the bathroom, but observing a light coming from under the door to the front bedroom on his right, he opened the door and entered. Immediately inside Smith observed a small table upon which was a set of triple beam balance scales, a clear plastic bag containing a white powder, and a box containing a roll of clear plastic bags. Smith completed the sweep search of the premises without locating Lyons. He returned outside to advise the other officers of what he had discovered in the house. Agent Goodowens then entered the house and, upon entering the front bedroom, saw the scales, the bag of white powder, and the roll of

plastic bags on a small table, together with what appeared to be more bags of white powder partially visible inside a green garbage bag lying in an open suitcase on the bed. Approximately fifteen minutes later, Agent Smith left for Atlanta to obtain a search warrant for the house. Upon obtaining a warrant, Smith telephoned the agents who had remained at the house and advised them of the existence of the warrant.

About this time, a truck occupied by a man and woman arrived at the house. Based on information obtained from appellant Gaultney, the agents believed the truck to contain "Jimmy," the state fugitive about whom Rassey's informant had spoken. This individual immediately was detained on his entry to the house and initially declined to identify himself any further than his first name of Jimmy. Later, the individual produced a North Carolina driver's license bearing the name "Carl James." That evening, the individual was identified as James Albert Smith, who was wanted by state authorities on drug charges.

A subsequent search of the house conducted pursuant to the warrant obtained by Agent Smith revealed a variety of narcotics possessing paraphernalia and some 43 pounds of almost pure cocaine.[4]

The law of this circuit is settled that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject." *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied sub nom. Miller* v. *United States*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977), and *cert. denied*, 430

[4] The search revealed a clear plastic bag containing 450 grams of 45% pure cocaine hydrochloride, two suitcases containing 8,394 grams of 99% pure cocaine hydrochloride and 10,445 grams of 95% pure cocaine hydrochloride respectively, a box of clear plastic bags, two sets of Ohaus triple beam balance scales, and a bag containing beta-manitol, a common cutting agent for cocaine.

U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). *See United States* v. *James*, 528 F.2d 999, 1017 (5th Cir. 1976), *cert. denied sub nom. Henry* v. *United States*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1977); *Rodriguez* v. *Jones*, 473 F.2d 599, 605-06 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973). As stated in *Cravero*, the test properly is framed in terms of the officer's reasonable belief.

> Reasonable belief embodies the same standards of reasonableness [as does probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

545 F.2d at 421.

A review of the facts in this case discloses that a valid warrant for the arrest of Richard Harrison Lyons, a/k/a "Ricky" Lyons was outstanding and that first-hand information from a reliable informant established that Lyons recently had been and was believed still to be in the dwelling containing the telephone. Based on these facts, the agents had objective grounds for forming a reasonable belief that the fugitive was present at the premises in question when they entered. *United States* v. *James*, 528 F.2d at 1017; *Rodriguez* v. *Jones*, 473 F.2d at 606. Having such a reasonable belief, the agent's warrantless entry of the premises was proper. *United States* v. *Cravero*, 545 F.2d at 421. The fact that the fugitive named in the arrest warrant was not found to be present on the premises at the moment of entry does not render the entry invalid. *United States* v. *James*, 528 F.2d at 1017; *United States* v. *Hofman*, 488 F.2d 287, 289 (5th Cir. 1974).

Counsel refers this court to the cases of *Payton* v. *New York* and *Riddick* v. *New York*, recently restored by

the Supreme Court to its calendar for reargument.[5] There, New York State statutes authorizing the entry of a suspect's home in the absence of exigent circumstances to effect the suspect's *warrantless arrest* are challenged as being violative of the fourth amendment. These cases, and the issue thus presented to the Supreme Court, are inapposite to the issue before this court today. Today, we apply the reasonable belief standard announced in *Cravero* where the entry occurs to execute an existing, valid arrest warrant.

Gaultney and Steagald further argue that the refusal of the district court to order the government to provide their expert witness with a primary reference sample[6] for use in an independent laboratory analysis constitutes a denial of due process of law. This court has held that

> Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

Barnard v. *Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). *See* F.R.Crim.P. 16(a)(1)(C). In cases involving a controlled substance, courts have held a concomitant part of the examination or inspection to be the right of the accused to have an independent chemical analysis

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[5] The Court of Appeals of New York affirmed the defendants' convictions in these cases. *People* v. *Payton*, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978). On appeal, the United States Supreme Court noted probable jurisdiction. 439 U.S. 1044, 99 S.Ct. 718, 58 L.Ed.2d 703 (1978). The cases were argued on March 26, 1979, 47 U.S.L.W. 3651 (U.S. April 3, 1979) (Nos. 78-5420, 5421), and subsequently were restored to the calendar for reargument. —— U.S. ——, 99 S.Ct. 2049, 60 L.Ed.2d 658 (1979).

[6] A primary reference sample is a sample of the drug in question, here cocaine hydrochloride, whose quality and purity are known.

performed on the seized substance. *See e.g., United States* v. *Pollock*, 402 F.Supp. 1310, 1312 (D. Mass. 1975); *United States* v. *Acarino*, 270 F.Supp. 526, 528 (E.D. N.Y. 1967). *See also, United States* v. *Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978). Our inquiry, therefore, focuses on whether the refusal of the district court to order the government to provide the defendant's expert with a primary reference sample placed an unreasonable restriction on the defendant's right to an independent analysis so as to deny him due process of law.

The facts disclose that the parties agreed that the independent analysis of the seized substance would be conducted at the Georgia State Crime Laboratory [GSCL] in Atlanta, Georgia. The GSCL has and enforces a policy of not supplying visiting independent examiners with a primary reference sample of controlled substances. Testimony from a government witness stated that the GSCL adheres to this policy for three reasons. First, independent examiners who are licensed to possess controlled substances are allowed by law to possess their own primary reference samples. *See generally* 21 U.S.C. §§ 821-24; 21 C.F.R. § 1301; Ga. Code Ann. §§ 79A-813 to -816. Second, those independent examiners not so licensed can purchase "exempt standards" [7] from various private manufacturers. Third, various analytical chemistry techniques utilizing instruments available at the GSCL allow an analysis of an unknown compound without the use of a reference sample, either primary or exempt.

Gaultney and Steagald make no showing that the policy of the GSCL prevented their expert from conducting an independent analysis to show that the seized sub-

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[7] An exempt standard is a mixture containing a controlled substance, here cocaine hydrochloride, that is prepared for laboratory, industrial, educational or special research purposes which is packaged in such a manner, combination, quantity, proportion, or conconcentration so as not to present a potential for abuse. *See* 21 C.F.R. §§ 1308.23-.24.

stance was not cocaine. The record indicates that the expert never availed himself of the opportunity to examine the seized substance to determine whether he could make an independent analysis of its contents. Despite never previously having attempted an analysis using an exempt standard, the expert testified that any tests he might run restricted by the GSCL guidelines would yield results inferior to those obtained by the government's tests. This contention was vigorously disputed by the testimony of the GSCL Senior Forensic Chemist. In light of this conflicting testimony, there was no error in the trial court's determination that the GSCL policies regarding primary reference samples are reasonable. They did not operate to deprive appellants of due process of law.

Steagald additionally argues that the evidence produced at trial was insufficient to prove the requisite knowledge and intent to sustain his convictions. The evidence produced at trial shows that on September 16, 1977, Steagald contacted the Able-1 Answering Service in Atlanta, Georgia, to arrange a telephone answering service for the Rosen Import Company, Inc. A written agreement for such services was executed on behalf of Rosen Import Company by "G. K. Steagald (mgr.)." Able-1 subsequently received a check from Rosen Import Company, signed by G. K. Steagald, in payment for services rendered. On January 12, 1978, Steagald executed a lease agreement for warehouse space at 100-D Mill Street in Lawrenceville, Georgia. Steagald leased the warehouse in his own name and paid the first month's rent with a check drawn on the account of Rosen Import Company. On January 12, 1978, Bruce Duncan & Co., customs house brokers in Atlanta, Georgia, received a call from the Delta Airlines Airfreight Office [Delta] at Hartsfield International Airport in Atlanta, advising that Delta was holding a shipment of sixteen cartons of lamps and brass table bases from Colombia, South America, which were consigned to Rosen Import Company.

Having handled previous Rosen Import Company shipments, Bruce Duncan & Co. was familiar with Steagald as a representative of that company and therefore called to advise him that this shipment had arrived. Steagald requested that Bruce Duncan & Co. arrange for delivery of the shipment for the next day because "his customers needed the products." Bruce Duncan & Co., acting on information furnished by Steagald, contacted Theatres Service Company [TSC] regarding the delivery of the shipment. On January 14, 1978, after contact with both Delta and Steagald, TSC delivered sixteen crates to the warehouse at 100-D Mill Street. Steagald paid the freight charges with a Rosen Import Company check, signed for the shipment, and received a copy of the freight waybill as his receipt.

Steagald argues that the evidence produced is consistent with the innocent activities of an importer and that the government's evidence, by failing to place him inside the Buford, Georgia, house, fails sufficiently to prove knowledge and intent. However, the government's evidence also showed that during the search of the Buford, Georgia, house, the copy of the TSC freight waybill received by Steagald upon delivery of the sixteen crates to the Mill Street warehouse was discovered on the dining room table. Additionally, agents found in the house two blank Rosen Import Company checks bearing the next two consecutive numbers to that on the check used by Steagald to pay the TSC freight charges. The evidence further showed that Steagald, when taken into custody, was wearing only slacks and a long-sleeve shirt, clothing inconsistent with the coldness of the January afternoon, and that once taken inside the Buford, Georgia, house, told a DEA agent that he was cold and requested that she get a sweater or coat for him from the kitchen area. Moreover, on January 20, DEA agents obtained a search warrant for the warehouse located at 100-D Mill Street. There, agents discovered numerous wooden crates that had been opened previously and a

large number of lamps and brass table bases. All the brass table bases were hollow inside. During the search agents discovered a bag of white powder, subsequently determined to be 483 grams of cocaine, 70% pure, inside one of the brass table bases.

The sufficiency of the evidence to establish Steagald's knowledge and intent must be viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), with all credibility choices considered in support of the jury verdict. *United States* v. *Barresi*, 601 F.2d 193, at 195 (5th Cir. Aug. 22, 1979); *United States* v. *Black*, 497 F.2d 1039 (5th Cir. 1974). Applying this standard, there was sufficient evidence to support the jury's verdict.

Steagald further contends that the trial court committed reversible error when it failed to dismiss the indictment on grounds of double jeopardy. Steagald's first trial ended when, pursuant to his motion, the trial court declared a mistrial because of the publication of a prejudicial article in a local newspaper. Steagald claims that the prejudicial material in the article arose from a statement attributed to Gaultney and furnished to the press by the United States Attorney. Steagald argues that this action constitutes prosecutorial overreaching of such magnitude as to require application of the bar of double jeopardy. The law in this circuit was stated in *United States* v. *Kessler*, 530 F.2d 1246 (5th Cir. 1976), thus:

> [U]nder ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. . . . But the Supreme Court recognizes that there may be exceptions to that rule—rare cases involving circumstances which are "attributable to prosecutorial * * * overreaching,"
>
> Where "prosecutorial overreaching" is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. . . .
>
> * * * *

> To find "prosecutorial overreaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to reasonably conclude that a continuation of the tainted proceeding would result in a conviction.

530 F.2d at 1255-1256. This analysis must consider the totality of the circumstances prior to the mistrial in order to determine whether prosecutorial overreaching existed. *Id.* at 1256.

Under *Kesler's* test, the prosecutor's actions do not come close to prosecutorial overreaching. The record, as clarified by counsel during oral argument, shows that the transcript of Gaultney's statement which the prosecutor provided to the press contained no information that had not been introduced previously in the presence of the jury. Indeed, the United States Attorney's actions appear to have been motivated by a desire to ensure accuracy in the press's accounts. There was no error in the trial court's denial of Steagald's motion to dismiss the indictment on grounds of double jeopardy.

Finally, Steagald contends that the trial court committed reversible error in its supplemental charge to the jury, first by refusing to recharge on specific intent and reasonable doubt and second by inaccurately defining intent by failing to refer to specific intent. A review of the supplemental charge to the jury, together with the court's original charge, discloses no error. The district court in its supplemental charge expressly cautioned the jury not to consider his supplemental charge in an isolated context, but to consider the entire charge as given, ascribing no greater weight to the supplemental charge than to the original charge. In so doing, the district court took an appropriate and previously approved step to ensure a balanced charge so as to avoid any possibility of prejudice to the defendant. *United States* v. *Suther-*

land, 428 F.2d 1152, 1157-58 (5th Cir. 1970), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed. 2d 668 (1972). Furthermore, the original and supplemental charges, when considered as combined charges, accurately cover the points of law at issue. *United States* v. *Blevins*, 555 F.2d 1236, 1239 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978).

The convictions of Hoyt A. Gaultney and Gary K. Steagald are

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

I respectfully dissent from that portion of the opinion relating to the entry and search of the premises.

United States v. *Cravero*, 545 F.2d 406 (5th Cir.), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), permitted, without a search warrant, the entry of premises of a third party for execution of an arrest warrant, based upon the officer's *reasonable belief* that the subject of the arrest warrant was within the building. The court reasoned that despite a lack of exigent circumstances, an officer who has already been to the magistrate once to secure the arrest warrant need not make an additional trip if he has determined that the suspect is within certain premises. 545 F.2d at 421.

In *Cravero* the officers personally had observed the subject enter the dwelling and, after maintaining surveillance for several hours, reasonably concluded that the subject was still within the house. Here, however, we are confronted with a different factual situation. The arresting officer had not observed Ricky Lyons, the subject of the arrest warrant. His belief that Lyons was within the premises was based solely upon an informant's

tip. The informant had not seen Lyons on the premises,[1] but had merely heard his voice in the background during a telephone call from Jimmy, Lyons' companion, who stated that he and Lyons were at the location of a given telephone number. After matching the telephone number with a residence,[2] the officers, without first applying to a detached magistrate for a search warrant, proceeded to the premises where they detained the defendants and, after entering and looking through the rooms, discovered not the subject of the arrest warrant, but a cache of cocaine. As in *Cravero* there was an arrest warrant but no exigent circumstances; unlike *Cravero* the evidence linking the subject to the premises was extremely fragile and insufficient to justify an entry without a search warrant.[3]

In *Adams* v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court extended the *Terry* doctrine[4] to include a stop based not only on the policeman's observations but also on an informant's tip

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[1] Compare with *Rodriguez* v. *Jones*, 473 F.2d 599 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973) where informant had observed the subject enter the building.

[2] No address or name of resident was furnished by informant, but these were ascertained from the telephone company.

[3] The circuits are not in accord on this issue. The Third Circuit, in *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 928 (3rd Cir. 1974), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976), held: "Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." However, the Tenth Circuit, citing *Cravero* as authority, affirmed denial of a motion to suppress in a case factually similar to the case before us. *United States* v. *Harper*, 550 F.2d 610 (10th Cir. 1977), *cert. denied*, 434 U.S. 837, 98 S.Ct. 128, 54 L.Ed.2d 99 (1977).

[4] *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

which did not satisfy the *Aguilar-Spinelli* criteria.[5] *Adams* and *Terry* involved a minimal invasion of privacy, however, as compared with the greater intrusion occasioned by the search of a third party's private home. When an intrusion of such magnitude occurs, if not based upon the policeman's personal observation, nothing short of a full-fledged *Aguilar-Spinelli* tip should be acceptable.

Therefore, I would reverse the denial of the motion to suppress.

I concur with the remainder of the opinion relating to the other grounds of appeal.

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[5] *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 78-5329, 78-5416

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOYT ALBERT GAULTNEY, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY KEITH STEAGALD, DEFENDANT-APPELLANT

OPINION—April 14, 1980

Appeals from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

[Opinion Nov. 13, 1979, 606 F.2d 540 (5th Cir. 1979)]

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

PER CURIAM:

The decision of this panel in these actions appears at 606 F.2d 540 (5th Cir. 1979). On petition for panel rehearing, the majority opinion is modified by inserting the following paragraph after the thirteenth line, in the first column, on page 545:

Where the information leading to the formulation of the officer's reasonable belief is supplied by a confidential informant, a defendant at a motion to suppress hearing may challenge the validity of the information under *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli* v. *United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). *See generally Rodriguez* v. *Jones*, 473 F.2d [599] at 605-06 n.3. The inquiry to be made is simple and straightforward: Were the officers who decided to act on the information supplied by the confidential informant aware at the time they chose to act of "underlying circumstances" making the informant "reliable" and his information "credible"? The record discloses that Agents Rassey and Goodowens were aware of such underlying circumstances. The confidential informant's record of past reliability was known to Agent Rassey and is unchallenged by appellants' counsel. *See* note 2, *supra* at 542-43. Additionally, Agent Rassey was aware that the informant had known both "Jimmy" and Ricky Lyons for a number of years, that the informant had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977, that the informant on January 14, 1978, had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours, and that during a subsequent telephone conversation with "Jimmy" the confidential informant had heard Ricky Lyons' voice in the background. Agent Rassey passed much of this information along to Agent Goodowens. The knowledge of both the confidential informant's past reliability and the precise methods by which he gathered his information in this case provided sufficient underlying circumstances from which the agent

properly could conclude that the informant was reliable and the information he supplied was credible.

In all other respects, the petition for panel rehearing is DENIED.

A member of the court in active service having requested a poll on the reconsideration of these causes en banc, and a majority of the judges in active service not having voted in favor of it, the petition for rehearing en banc is DENIED.

KRAVITCH, Circuit Judge, dissenting:

I disagree with the majority that the tenuous information appended to the panel opinion satisfies the teachings of *Aguilar* and *Spinelli*. The more important problem, however, is the extension of the rule announced in *United States* v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5416

D.C. Docket No. 78-20A-CR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

GARY KEITH STEAGALD, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Georgia

Before THORNBERRY, CLARK and KRAVITCH, Circuit Judges.

JUDGMENT—April 22, 1980

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

November 13, 1979

Kravitch, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate: April 22, 1980

SUPREME COURT OF THE UNITED STATES

No. 79-6777

GARY KEITH STEAGALD, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

October 6, 1980

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No. 79-6777

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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GARY KEITH STEAGALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1979

No. 79-6777

GARY KEITH STEAGALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether evidence seized as a result of officers' entry into petitioner's residence, armed with an arrest warrant for a third party whom they had probable cause to believe was present, should have been suppressed because of the officers' failure to procure a search warrant.

2. Whether there was probable cause to believe that the subject of the arrest warrant was at the location in question.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 606 F.2d 540, and an opinion modifying it in part (Pet. App. 11-12) is reported at 615 F.2d 642.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1979. A petition for rehearing was granted in part, and the original opinion was modified on April 14, 1980. On May 13, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to June 13, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing cocaine with intent to distribute it and of conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to five years' imprisonment, to be followed by a three-year special parole term.

1. The evidence at trial showed that petitioner and co-defendant Hoyt Albert Gaultney[1/] operated a scheme

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1/ Gaultney was convicted in a separate trial on the same charges for which petitioner was convicted and, in addition, on one count of unlawful importation of cocaine (21 U.S.C. 952(a)). His conviction was affirmed, along with petitioner's, in a joint opinion.

to distribute large quantities of cocaine that had been smuggled into this country from Colombia, South America. Petitioner and Gaultney used a dummy import company as a front for their illicit activities (see 2 Tr. 126, 132-133).[2/] The cocaine was concealed in the hollowed-out wooden bases of tables imported from Colombia (2 Tr. 120-123, 159, 162-163, 173-174, 180-184).

A search on January 18, 1978, of a house occupied by petitioner, Gaultney, and Gaultney's wife revealed more than 42 pounds of cocaine, and a later search of the import company's warehouse, which was leased in petitioner's name, produced another pound of cocaine still hidden in one of the table bases (Pet. App. 5; 1 Tr. 25, 55, 58-60, 65-66; 2 Tr. 120-123, 309-210, 213, 215, 218).

The circumstances surrounding the search of the residence are fully set forth in the opinion of the court of appeals (Pet. App. 3-5). On January 4, 1978, DEA Agent Joseph Rassey was contacted by an informant whom he had known for about five years and who had provided information leading to seven arrests, three of which resulted in convictions and four of which were still pending (Pet. App. 3-4 n.2). The informant said he could locate a Ricky Lyons, for whom a federal arrest warrant was outstanding, and a Georgia state fugitive name "Jimmy", who was using the alias "Carl James"

2/ "Tr." refers to the trial transcript, which is in two volumes. "H.Tr." refers to the three-volume transcript of the suppression hearing.

(Pet. App. 3-4). The informant telephoned Agent Rassey again on January 14 and gave him a telephone number where Lyons and Jimmy could be reached in the Atlanta, Georgia, area (Pet. App. 4). Agent Rassey conveyed this information to Agent Kelly Goodowens in the DEA's Savannah, Georgia, office on Monday, January 16 (ibid.). Agent Goodowens, who was aware of Lyons' previous indictment for marijuana smuggling, found that an arrest warrant was still pending for Lyons. With the help of the telephone company, Agent Goodowens then learned that the number provided by Rassey's informant was located at a rural address in Buford, Georgia (ibid.).

Rassey's informant contacted him several times on January 16-18; each time, the informant confirmed that Lyons and Jimmy were still at the number (ibid.). The informant also advised Agent Rassey that as many as four or five other people would be with Lyons (ibid.; 2 H.Tr. 48). Rassey passed this additional information on to Goodowens, the last conversation occurring on the morning of January 18 (Pet. App. 4). That same afternoon, Goodowens and two other agents located the address at which the telephone number was listed. The agents drove past the house; they saw an old Volkswagen parked in the driveway and smoke coming from the chimney, but no people were visible (ibid.; 1 H.Tr. 24).

About 25 minutes later, the agents coordinated plans with assisting officers for the execution of the arrest warrant on Lyons, who was believed to be armed and dangerous (Pet. App. 4; 1 H.Tr. 24-25; 2 H.Tr. 3-4, 5-). As they approached the house, Agents Goodowens and Smith noticed two

men near the Volkswagen. Agent Smith first thought one of the men was Lyons, but upon realizing his mistake, continued to the house. The two men were detained; one was petitioner, and the other was Gaultney, who was armed (Pet. App. 4).

Agent Smith then went to the house, where he was greeted by Gaultney's wife (ibid.). Smith told her that he was a police officer with a warrant for Ricky Lyons' arrest, and he asked Mrs. Gaultney if Lyons was in the house (ibid.). When she replied that there was "no one by that name" in the house, Smith directed her to place her hands on the wall and had another officer watch her; Agent Smith then made a sweep search of the residence (id. at 4-5). He first looked in a bathroom, then proceeded to a bedroom because he saw light from beneath the door (id. at 5). Inside this room Agent Smith saw a small table on which were a set of triple beam balance scales and a plastic bag containing a white powder (ibid.). Smith then completed the sweep search of the house; he found neither Lyons nor anyone else. After summoning the other agents into the house, Agent Smith left for Atlanta to obtain a search warrant for the house (ibid.). Later that evening, Agent Smith telephoned the agents who had remained behind to advise them that the U.S. Magistrate had issued the warrant.

At about this time, a truck arrived at the house. Based on information they had received from Gaultney, the agents believed that "Jimmy," the state fugitive Agent Rassey's informant had mentioned, was in the truck (Pet. App. 5). This individual was detained upon his entry into the house,

and although he refused to identify himself, he later was determined to be James Albert Smith, who was wanted by state authorities on drug charges. He was carrying a driver's license in the name of "Carl James" (ibid.).

A warrant-authorized search of the house followed, revealing various narcotics processing equipment and approximately 43 pounds of almost pure cocaine (ibid.).

2. Petitioner moved to suppress this evidence at trial for failure of the DEA agents to have a search warrant for the initial entry. The district court denied his motion, and the court of appeals affirmed on the basis of its earlier decision in United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100 & 430 U.S. 983 (1977), which held that a police officer who possesses a valid arrest warrant and who reasonably believes that the subject of the warrant is in a third party's residence need not obtain a search warrant to enter the premises for the purpose of arresting the subject (Pet. App. 5-6, 12). Judge Kravitch dissented. She was of the view that the circumstances here did not meet the requirements of Cravero (Pet. App. 9 & 615 F.2d at 644) [3/] and that, in any event, Cravero represented "a rule of questionable validity and wisdom" (615 F.2d at 644).

3/ The appendix to the copy of the petition we have received does not contain Judge Kravitch's dissent to the modification of the opinion on rehearing, reported at 615 F.2d 642, 644.

ARGUMENT

Petitioner correctly states that the courts of appeals are divided on the question whether law enforcement officers, having obtained an arrest warrant and possessing probable cause to believe that the person named in the warrant is at the home of a third party, must in addition secure a search warrant in order to enter those premises to search for and arrest the suspect. Compare, e.g., United States v. Cravero, 545 F.2d 406, 42 (5th Cir. 1976), cert. denied, 429 U.S. 1100 and 430 U.S. 983 (1977); United States v. McKinney, 379 F.2d 259, 262-263 (6th Cir. 1967) (issuance of an arrest warrant is an "exceptional circumstance" allowing a search, in light of the mobility of suspect);[4/] and United States v. Harper, 550 F.2d 610, 613-614 (10th Cir.), cert. denied, 434 U.S. 837 (1977) (arrest warrant sufficient; dwelling may have been defendant's own residence) with Government of the Virgin Islands v. Gereau, 502 F.2d 914, 928-930 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975) (admitting evidence in light of the existence of exigent circumstances); Fisher v. Volz, 496 F.2d 333, 338-342 (3d Cir. 1974) (dictum); Wallace v. King, No. 78-1399 (4th Cir. July 1, 1980).

4/ In United States v. Shye, 492 F.2d 886 (6th Cir. 1974), cited by petitioner (Pet. 21), the Sixth Circuit upheld, on a showing of exigent circumstances, a warrantless entry to effect arrests of bank robbers. Because police had not obtained arrest warrants, the court had no reason to address the question whether the same exigent circumstances showing would be necessary if the police had possessed arrest warrants and probable cause to believe the subjects of the warrants were within the apartment they entered.

We agree that this issue is a significant one that may require consideration by this Court in an appropriate case, but we do not agree that this is such a case. The entry in question here took place on January 18, 1978. At that time, the action of the agents complied with the applicable law of the Fifth Circuit (United States v. Cravero, supra), where the entry occurred.[5/] Since the agents' actions conformed to the applicable law at the time of the search, the deterrent purposes of the exclusionary rule could not possibly be furthered by a decision at this date that their actions violated the Fourth Amendment, although they had no way of knowing it at the time. In such circumstances, suppression of the evidence and reversal of petitioner's conviction is not appropriate. See Michigan v. De Fillipo, 443 U.S. 31 (1979); Bowen v. United States, 422 U.S. 916 (1975); United States v. Peltier, 422 U.S. 531, 535-542 (1975).[6/]

5/ Indeed, at the time of the search no court of appeals except the Third Circuit (Government of the Virgin Islands v. Gereau, supra) had held the procedure followed here to be invalid. Moreover, in Cravero itself one of the defendants had sought review by this Court on this precise issue, and certiorari was denied despite the United States' acquiescence. Cook v. United States, 430 U.S. 983 (1977).

6/ Petitioner suggests (Pet. 9-11) that the scope of the search following the entry but preceding issuance of the search warrant exceeded that which might be proper as a search for Lyons or as a self-protective search incident to the arrests of petitioner and his co-defendants under United States v. Chimel, 395 U.S. 752 (1969). Petitioner has not, however, specified that as a question for this Court's review, nor did he raise it in the court below. Accordingly, we do not address it here.

It is arguable that this Court's decision on the closely related issue of an entirely warrantless entry into a suspect's home in Payton v. New York, No. 78-5420 (April 15, 1980), casts doubt upon the continuing validity of the Fifth Circuit's rule. This, however, is simply an additional reason to decline review of this issue in connection with searches antedating the Payton decision, since it is possible that courts previously upholding arrest warrant entries into third party premises will reconsider the question in light of Payton and reach a different conclusion.[7/]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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Attorney

SEPTEMBER 1980

7/ We are advised that it is the present policy of the Drug Enforcement Administration, whose agents conducted the search in the present case, to secure a search warrant prior to making an arrest entry into third party premises, in the absence of exigent circumstances or consent.

No. 79-6777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY KEITH STEAGALD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

I. **Whether The Fourth Amendment To The United States Constitution Requires Law Enforcement Officers Armed With An Arrest Warrant, But In The Absence Of Exigent Circumstances, To Obtain A Search Warrant To Enter The Premises Of A Third Party, *Not* Named In The Arrest Warrant, In Order To Effectuate The Arrest.**

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as *United States* v. *Gaultney*, No. 78-5329, and *United States* v. *Steagald*, No. 78-5416, 606, F.2d 540 (5th Cir. 1979), Petition for Panel Rehearing granted in part and denied in part, Petition for Rehearing en banc denied, 615 F.2d 642 (5th Cir. 1980), as set out hereafter at J.A. 20 — 37.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1980. On May 13, 1980, Mr. Justice Powell signed an Order granting until June 13, 1980, an extension of time within which to petition for certiorari. The Petition for Certiorari was docketed in the Supreme Court of the United States on June 13, 1980. The Writ of Certiorari was granted on October 6, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. IV (as set out in Petition for Certiorari, Appendix B, page 1).

RULES INVOLVED

Rule 4 of the Federal Rules of Criminal Procedure (as set out in Petition for Certiorari, Appendix C, page 1).

Rule 41 of the Federal Rules of Criminal Procedure (as set out in Petition for Certiorari, Appendix C, page 2).

STATEMENT OF THE CASE

This criminal action was brought under a three count indictment (the Petitioner being named in Counts One and Two only) charging the Petitioner with possession with intent to distribute a quantity of cocaine (a Scheduled II controlled substance), in violation of 21 United States Code 841(a)(1) in Count One, and conspiracy to violate 21 United States Code 841(a)(1) in violation of 21 United States Code 846 in Count Two. Also charged in Counts One and Two were Cathy Gaultney, Hoyt Gaultney and James Albert Smith. Additionally, Hoyt Gaultney was charged in the same indictment with importation of the same cocaine in violation of 21 United States Code 952(c) in Count Three (J.A. 3 — 5).

Hoyt Gaultney was convicted following a jury trial before the Honorable Charles A. Moye, United States District Court Judge for the Northern District of Georgia, on all three counts in a separate and previous trial. His conviction was affirmed in *United States* v. *Gaultney*, 606 F.2d 540 (5th Cir. 1979), Petition for Panel Rehearing granted in part and denied in part, 615 F.2d 642 (5th Cir. 1980) (J.A. 20 — 37). Cathy Gaultney and James Albert Smith were tried subsequently with Petitioner, and each of them prevailed on Motions for Judgment of Acquittal at the close of the government's case in chief. (Tr. 276). Petitioner's Motion for Judgment of Acquittal at the close of the government's case was denied (Tr. 276) and upon renewal of his Motion at the close of all the evidence, the Court denied the Motion again (Tr. 282).

Finally, Petitioner filed a renewal of his Motion for Judgment of Acquittal following the jury's verdict of guilty on both counts (R. 100). On June 12, 1978, Petitioner's Renewal of his Motion for Judgment of Acquittal was denied by the court (R. 108).

On June 27, 1978, Petitioner was sentenced by Judge Moye to five years on Count One and five years on Count two to be followed by a special parole term of three years, with the sentence in Count Two to run concurrently with the sentence in Count One (R. 112). And, on the same date, Steagald filed his Notice of Appeal and the Court granted his Motion to Proceed in Forma Pauperis. (R. 113).

Gaultney's and Petitioner's cases were appealed separately but were joined for oral argument and were jointly decided by a panel of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court, citing the Fifth Circuit's opinion in *United States* v. *Cravero*, 545 F.2d 406, *cert. den.*, 430 U.S. 983 (1976). Judge Kravitch dissented, saying that "Unlike *Cravero* the evidence linking the subject [of the arrest warrant] to the premises was extremely fragile and insufficient to justify as entry without a search warrant." On April 14, 1980, the same panel, in a per curium opinion, granted in part and denied in part the Petition for Panel Rehearing, and denied the Petition for Rehearing En Banc. 615 F.2d 645 (1980). (J.A. 35 — 37) Judge Kravitch again dissented on the issue of probable cause and continued that "The more important problem, however, is the extension of the rule announced in

United States v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties. " at 644. (J.A. 37).

On May 13, 1980, Mr. Justice Powell signed an Order granting until June 13, 1980, an extension of time within which to petition for certiorari. The Petition for Certiorari was docketed in the Supreme Court of the United States on June 13, 1980. The Writ of Certiorari was granted on October 6, 1980. (J.A. 39).

On November 3, 1980, the motion of Petitioner for appointment of counsel was granted, and an Order was entered appointing John Richard Young, Esquire, of Atlanta, Georgia, to serve as counsel for the Petitioner in this case.

STATEMENT OF FACTS

On January 4, 1978, Agent Joseph Rassey of the Drug Enforcement Administration was contacted by an individual who had provided him with information concerning drug cases in the past. This individual (hereafter referred to as C.I.) told Agent Rassey that he might be able to locate Ricky Lyons, a federal fugitive, and a guy named "Jimmy" who he believed was a state fugitive. Lyons had been indicted by a federal grand jury in the Southern District of Georgia, and a warrant for his arrest dated July 14, 1977, was issued. (1st Supp. Vol. I, P. 14). He further told Agent Rassey that Jimmy had some cocaine to sell (1st Supp. Vol. II, p. 43). Initially

Agent Rassey was interested in the C.I. setting up the drug deal but subsequently he contacted Agent Kelly Goodowens in Savannah, Georgia, and relayed the information he had obtained from the C.I.

On January 14, 1978, the C.I. called Rassey and said he had "received a phone call from Jimmy and that it was a number where Jimmy and Ricky were going to be within the next twenty-four hours" (1st Supp. Vol. II, p. 36). Rassey was unable to reach Goodowens that day and waited until Monday, January 16, 1978, to relay the phone number he had obtained to Goodowens. Rassey said that he spoke with the C.I. just prior to reaching Goodowens on the 16th and the C.I. told him the number was still good (1st Supp. Vol. II. p. 38). Rassey testified that he did not inquire of the C.I. as to what his basis was for concluding that Jimmy was calling from the particular number he had. Rassey accepted the C.I.'s conclusion because "he had always given me good information before. He said he knew they were there." (1st Supp. Vol. II, p. 50). The C.I. was unable to say from what location specifically Ricky Lyons or Jimmy was calling or how long they would be there. Rassey testified that it was his impression "from what he said was that they were just going to be there for a while; they did not live there". (1st Supp. Vol. II, P. 47). The C.I. also told Rassey that there would be four or five people at the residence. When asked about the basis of his belief in this statement, the C.I. replied, "Well, I just know that there's you know, some people there" (1st Supp. Vol. II, p. 48). Rassey spoke with the C.I. several

times by telephone on January 18, 1978, and relayed to Goodowens that the C.I. said the information was "still good" (1st Supp. Vol. II, p. 49).

On January 16, 1978, after Goodowens received a telephone number from Agent Rassey, he contacted Southern Bell's Security Division and obtained the address for the telephone number. He learned that the phone was listed in the name of Richard E. Fisher (1st Supp. Vol. I, p. 18-19). On January 18, 1978, after having difficulty locating the address, Goodowens contacted Southern Bell again and obtained detailed directions on how to get to the residence (1st Supp. Vol. I, p. 10). At no time on these days did Goodowens attempt to reach Mr. Fisher though he had determined that Mr. Fisher was located in the directory, along with another residence phone (1st Supp. Vol. I, p. 112).

On January 18, 1978, based on the information he obtained from Rassey, Goodowens decided to go to the Carey Court location in an attempt to find Lyons. Despite the fact that he was in the federal courthouse in Atlanta when he received the final call from Rassey, no search warrant was obtained (1st Supp. Vol. I, p. 79, 86-87). Goodowens testified that physically he could have obtained a search warrant; there was "no physical hinderance" (1st Supp. Vol. I, p. 87). Goodowens also had received information from Rassey that there would possibly be drugs at the residence (1st Supp. Vol. I, p. 39, 88). However, Gwinnett County Detective Fowler stated it a bit more strongly in his testimony when he testified that DEA Agent Smith "had previously told me

that he had information that there might be a quantity of majijuana at the location" (1st Supp. Vol. II, p. 107). And "to the best of my recollection I believe he stated 1500 pounds" (1st Supp. Vol. II, p. 108).

Agent Smith called in several other agents to accompany himself and Goodowens. None of the officers had any photographs of Lyons (1st Supp. Vol. I, p. 46) nor did they have a copy of the arrest warrant (1st Supp. Vol. I, p. 45, 46). Since none of the officers had ever even seen the arrest warrant (1st Supp. Vol. I, p. 47), they apparently were relying on Goodowens' knowledge of the 18 month old indictment (1st Supp. Vol. I, p. 45). Only Agent Smith had testified that he knew Ricky Lyons by sight, and he mistakenly though that Gaultney was Lyons at their first encounter (1st Supp. Vol. II, p. 55).

Altogether there were nine or ten officers, some of whom had requested to come along, comprising the raid squad. All of the officers were in plain clothes and unmarked cars (1st Supp. Vol. I, p. 59). They conducted no surveillance of the residence, though they did drive by and notice that smoke was coming out of the chimney of one of the two houses at the Carey Court location (1st Supp. Vol. I, p. 61).

As the officers approached the house, guns drawn, two male individuals were seen standing at the rear of a Volkswagen. The individuals were Gaultney and Steagald. Gaultney was squatting down at the rear deck of the car. As Smith approached the car he "reached down and grabbed him and picked him up., or almost

picked him up, and said 'Ricky' " (1st Supp. Vol. II, p. 55). In response to why he had done that, Smith testified ". . . at first I thought he was Ricky Lyons; it looked like him to me" (1st Supp. Vol. II, p.55). When Agent Smith decided that this individual was not Lyons, he "turned him around and faced him toward the car" (1st Supp. Vol. II, p. 56). Both men were frisked right there in the driveway in plain view of the public road and identification was demanded of each of them.

Meanwhile, three other agents, including Agent Jim Williams, who arrived in a separate vehicle, headed for the A-frame (the second residence bearing the same address). These agents also approached this residence with their guns drawn. Agent Williams testified, "The purpose of going to the A-frame was the same as going to the house at the top of the hill. We didn't know which house that the individuals might have been at" (1st Supp. Vol. III, p. 17). When it became apparent that the other house was not occupied, Williams returned to the driveway where Gaultney and Steagald were being detained. Williams testified that he thought he "left one officer down there" at the A-frame (1st Supp. Vol. III, p. 17).

After deciding that Gaultney was not Lyons, Agent Smith and another officer, Detective Conway, ran down to the house and demanded entry of Gaultney's wife, Cathy, who had come to the door (1st Supp. Vol. III, p. 51-55). Agent Smith testified that he was dressed in blue jeans with a badge clipped to the pocket of his denim shirt (1st Supp. Vol. II, p. 56); he also had his gun

drawn. Agent Smith described himself as being 34 years old, six feet six and a half inches tall and weighing 270 pounds. He also testified that Mrs. Gaultney looked to be "about five foot four inches or five foot five inches, weigh[ing] less than 100 pounds, right at 100 pounds." He further stated that "the first time I saw her, frankly, I thought she was about 12 or 13" (1st Supp. Vol. II, p.72). Smith told Mrs. Gaultney that he had a warrant for Ricky Lyons. She also correctly identified the two men outside as he husband and Gary Steagald and told Smith that she was "here by myself" (1st Supp. Vol. II, p. 77). Smith told her to "put her hands on the wall and don't move" (1st Supp. Vol. II, p. 77). Cathy Gaultney testified that Smith placed his gun in her back while she was faced to the wall (1st Supp. Vol. III, p. 56). Agent Smith then left her with Detective Conway guarding her while he searched the rest of the house. It was his testimony that she was not free to leave until "I got through searching the house. . . " (1st Supp. Vol. II, p. 77).

As Agent Smith proceeded through the house, he went into the front bedroom and observed a small table with a set of scales and a bag of white power on it (1st Supp. Vol. II, p. 60). Smith testified that there were two beds in the room and that he "looked under the first bed, looked over the second bed, checked it. . . " (1st Supp. Vol. II, p. 60).

Smith left the front bedroom, checked the second bedroom and then returned to the main room and informed Detective Conway that he thought he had seen

cocaine in the bedroom and that "We need to get our act together" (1st Supp. Vol. II, p. 62). Then he went outside and related this to the other agents. Goodowens suggested that Smith drive to Atlanta and assist in getting a search warrant for the house (1st Supp. Vol. II, p. 63-64).

Petitioner was handcuffed as soon as he was taken into the house, after he had furnished the officers with all his identification. Agent Williams testified that he did not know why Steagald was being held in custody (1st Supp. Vol. III, p. 20).

Gaultney indicated to Williams that he wished to talk with him and was taken into the back bedroom. Agent Goodowens testified that he conducted a weapon search of the bedroom for Agent Williams' protection. This search involved looking around a small dressing table, opening drawers, and removing a closed suitcase from a closet shelf which he opened and in which he saw what he believed to be packets of suspected cocaine (1st Supp. Vol. I, p. 37-38). Goodowens placed the suitcase at the other side of the room. At this point Agent Williams was alone with Gaultney.

During this time, Agent Smith had appeared before Magistrate Forrester in the hearing room at the Magistrate's Court and obtained a search warrant. There is some dispute as to the time of its issuance as Agent Smith does not believe that it was 8:00 P.M. when Judge Forrester signed the warrant as is so indicated on the warrant. Magistrate Forrester testified at the Motion to Suppress hearing that his recollection as the time was not

specific. There was a large wall clock in the room where the warrant was signed (1st Supp. Vol. II, p. 33). He did feel that it probably was earlier than 8:00 p.m. but admitted that the authorization was in his own handwriting and he filled in the time "8:00 p.m." (1st Supp. Vol. II, p. 25, 31-32). Agent Smith stated that he went immediately to a phone and called Agent Durrell at the house and relayed to him that a search warrant had been obtained. Agent Smith left the courthouse with the search warrant, stopped for something to eat, and arrived back at the house after 9:00 p.m.

While Agent Smith was talking to Agent Durrell on the phone, James Smith and his wife drove up to the house. Upon entering the house both were met at gunpoint. Agent Goodowens stepped forward with a shotgun and advised he was a federal agent and ordered them both to put their hands on the wall (1st Supp. Vol. I, p. 104). Smith was searched, taken into custody, handcuffed and then taken into the living room with the other defendants. His wife, though no charges were made against her, was placed on the coach with the others. Goodowens testified that she would not have been allowed to leave (1st Supp. Vol. I, p. 108).

Agent Goodowens went to defendant Smith's truck and looked inside to see if there were any other persons in it. Determining that there were not, he returned inside (1st Supp. Vol. I, p. 108).

The search of the premises allegedly pursuant to the serach warrant was conducted before 8:00 p.m., some 10 to 15 minutes after the agents received word from Agent

Smith that the search warrant was in his possession. Subsequently several items were seized, including another suitcase containing suspected cocaine (1st Supp. Vol. I, p. 93).

Agent Smith testified that he arrived back at the house sometime after 9:00 p.m., and about one-half hour to 45 minutes later went out to Smith's Dodge truck and began searching it. He looked through papers and other items on the front floorboard and subsequently found a closed briefcase with a combination lock on it. Agent Smith took the case into the house and went through it (1st Supp. Vol. II, p. 93-94). During this time Defendant Smith was still handcuffed and being held inside the house. He did not consent to the search of the truck (1st Supp. Vol. II, p. 94). Agent Smith said he searched the vehicle to obtain evidence of Defendant Smith's identity (1st Supp. Vol. II, p. 69-70, 93-101, 109). Evidence taken from Smith's truck was suppressed by the district court below.

Each of the individuals, with the exception of Smith's wife, was arrested and shortly thereafter indicted on charges relating to the cocaine seized in the search of the house. Additional warrants were later obtained for a warehouse in Gwinnett County and one in Fulton County and residences in DeKalb and Clayton Counties and various items seized. It is Petitioner's contention that these searches were "fruits of the poisonous tree" as it is uncontested that they flowed from the initial search of the house.

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the Constitution of the United States protects an individual's reasonable expectation of privacy from government intrusion. Nowhere is this expectation greater than in the interest of the individual in the sanctity and security of his own home. Therefore, the Amendment commands that a neutral and detached magistrate approve a request by government officials to invade that privacy prior to an entry into the individual's home. Only in certain well-delineated circumstances narrowly drawn in order to give effect to the commands of the Fourth Amendment, may the government agents, based upon probable cause, enter an individual's home without first securing a search warrant.

In view of the Amendment's concern with the expectation of privacy, especially when it relates to the sanctity of an individual's home, prior judicial approval for an entry into a house is required, whether the government seeks entry to search for tangible objects or for persons. The express language of the Amendment speaks of protection against unreasonable searches and seizures in relation to "persons, houses, papers and effects" without distinguishing between the objects of the search or seizure. Moreover, the Warrant Clause specifically requires a particular description of the place to be searched in addition to an equally specific description of any persons or objects intended to be seized. Consequently, if the focus of the Fourth Amendment is in part to scrutinize the narrow right of the government to make entries into homes, then it is irrelevant to the

inquiry of the legitimacy of the entry, whether the entry was for a search for persons or a search for objects.

In addition, this Court's rationale for its holding in *Payton* v. *New York*, requiring an arrest warrant to enter a suspect's home to arrest him, logically supports a requirement for the particular protection provided by a search warrant when the entry to arrest a suspect occurs at a residence of an individual not named in the arrest warrant. The issuance of the arrest warrant is irrelevant to the Fourth Amendment interests of the third person that are guaranteed by the Amendment.

Therefore, the entry by the government in the instant case, without a search warrant and without any recognized exception to the search warrant requirement, was unlawful, and the products of the search should have been excluded from evidence at Petitioner's trial below.

ARGUMENT

I. In Order To Effectuate The Fourth Amendment's Protection Of An Individual's Expectation Of Privacy, Police Must Secure A Search Warrant Before Executing An Arrest Warrant At The Residence Of A Third Party, Not Named In The Arrest Warrant, In The Absence Of Exigent Circumstances.

A. The Fourth Amendment requires a search warrant before law enforcement officials may intrude upon one's expectation of privacy, except in the case of well defined exceptions.

The United States Supreme Court has consistently held that the Fourth Amendment dictates that searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978). As the amendment proscribes all unreasonable searches and seizures, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971), "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967); *Michigan* v. *Tyler*, 3436 U.S. 499, 506 (1978).

Logically, this requirement ensures the continued sanctity of the amendment's underlying purpose of protecting an individual's reasonable expectation of privacy, as set forth in *Katz*. Therefore, this Court has held that:

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948).

Not only does this prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure, *United States* v. *Martinex-Fuente* 428 U.S. 543, 565 (1976), citing *United States* v. *Watson*, 423 U.S. 411, 455-456, n. 22(1976) (Marshall, J. dissenting), but it also guards against erosion of the basic precepts of a democratic society. The classic statement of this purpose embodies the rationale of the Court's preference for

judicially approved warrants. As stated by Justice Jackson in *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of fereting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the peoples' homes decure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officier, not by a policeman or government enforcement agent."

Moreover, while the amendment's proscriptions are deemed to protect people, not places, *Katz*, *supra*, the private homes of individuals have always evoked the need for heightened protection. In *Stone* v. *Powell*, 428 U.S. 465 (1976), the Court concluded that "the Amend-

ment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect the 'sanctity of a man's home and the privacies of life from searches under unchecked general authority." (Citations and note omitted). In addition, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). Only last term this Court held that it is a " 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable". *Payton* v. *New York*, _____ U.S. _____, 100 S.Ct. 1371, _____, 27 CrL 3033, 3036 (1980). The Payton Court merely reaffirmed previous Supreme Court holdings. *Agnello* v. *United States*, 269 U.S. 20, 32 (1925) ("The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws".); *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970) (" 'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant' ", citing *Agnello* v. *United States*, 269 U.S. at 33).

In the case at bar, the Drug Enforcement Administration officials had no warrant to search the Carey Court residence. The existence of an arrest warrant does not provide the Fourth Amendment protection to the third party's expectation of privacy in his own home mandated by the Fourth Amendment and court precedent. *Payton*, *supra*. More important, the government

agents cannot justify their warrantless entry into Petitioner's home by any recognized exigent circumstance which will obviate the need for a search warrant. The exceptions include: (a) a search incident to and *following* a lawful arrest, *Chimel* v. *California*, 395 U.S. 752 (1969); (b) a search of a vehicle with probable cause, *Carroll* v. *United States*, 267 U.S. 132 (1975); (c) a consent search, *Johnson* v. *United States*, 333 U.S. 10 (1948); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968); (d) a search with probable cause for and in hot pursuit of a fleeing and dangerous felony suspect, *Warden* v. *Hayden*, 387 U.S. 294 (1967); (e) a search of abandoned real estate or personal property, *Abel* v. *United States*, 362 U.S. 217 (1960); (f) a search under urgent necessity, *United States* v. *Barone*, 330 F.2d 543 (2nd Cir. 1964), *cert. denied*, 377 U.S. 1004 (1964); (g) a search pursuant to custodial prerogative, *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); (h) a search with probable cause, necessary to prevent loss or destruction of the thing to be seized, *United States* v. *Barone, supra*; *Johnson* v. *United States, supra*; and (i) a search in which evidence is encountered inadvertently, in plain view, when the officers are lawfully on the premises, *Coolidge* v. *New Hampshire, supra*.

In addition, there is recognized a "general exigency" exception which requires an analysis of several factors to determine whether there "is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *United States* v. *Adams*, 621 F.2d 41,44 (1st Cir. 1980). In *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970), the court

found sufficient exigency to affirm the denial of suppression of certain stolen goods seized upon the warrantless, unconsented, nonforceable entry into an armed robber's home. The entry occurred after police obtained eyewitness identification of Dorman and at a time when no magistrate was readily available. 435 F.2d at 387-388. Among the factors enumerated were: (a) the violent character of the offense; (b) the existence of a reasonable belief that the suspect was armed; (c) the clear showing of probable cause that the suspect had committed the crime alleged; (d) the presence of strong reason to believe the suspect was on the premises; (e) the likelihood that the suspect would escape if not swiftly apprehended; and (f) the fact that the entry, though not consented to, was nevertheless made peaceably.

Thus, the contrast between *Dorman*, *supra*, and the case at bar is stark. Here, the offense for which the suspect was sought was non-violent. There existed no reasonable belief that the suspect was armed. Any belief that the suspect was still on the premises was less than strong. The entry was not only non-consentual, but was lacking in peaceableness as well, being effectuated by numerous officers armed with shotguns and brandished pistols. And, there was no showing of any increased danger to the community or the officers that made the bypass of a detached judicial officer imperative. Indeed, the officers had ample time and opportunity to seek a search warrant from a magistrate, a course of action that would have been consistent both with effective law

enforcement and with the expectation of privacy so understandably valued in a democratic society. Instead, they chose to perform the magistrate's job for him.

Moreover, while there was an outstanding arrest warrant for the suspect Lyons, the agents did not possess it at the time of the raid, and only one agent allegedly knew Lyons by sight. Although for purposes of this petition probable cause of Lyons' presence at the house is assumed, one circuit judge below entertained strong doubts. *United States* v. *Gaultney*, 615 F.2d 642, 644 (5th Cir. 1980) (Kravitch, J., dissenting). Importantly, there was no urgency for the raid, the agents having had for *two days* the relevant information that the suspect allegedly would be at the house "for a while". Nor was there any evidence of impending flight.

Significantly, this Court, in interpreting the stringency of the warrant requirements, has not expanded the exceptions to the warrant necessity beyond these well-delineated boundaries. *Supra*, pg. 15. Therefore, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment". *Mincey* v. *Arizona*, *supra*, 437 U.S. at 393. In *Mincey*, the police attempted to justify an extensive multi-day, warrantless search of defendant's residence following the murder of a police officer as a "murder scene exception". 437 U.S. at 392. In rejecting this theory, the Court stated:

> "The Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally

sacrificed in the name of maximum simplicity in enforcement of the criminal law." 437 U.S. at 393.

Earlier, the Supreme Court had rejected a further exception to Fourth Amendment warrant protections by holding that "there is no dimunition in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately." *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978).

However, in the face of these clear limitations, cases hold that an arrest warrant for a suspect is itself an exception to the search warrant requirement, when the existence of the arrest warrant is used to gain access to the third person's dwelling to effect a search for the suspect. Petitioner contends that these cases deviate from the Amendment's history and purpose. In *United States* v. *McKinney*, 379 F.2d 259 (6th Cir. 1967), it was held that "there is good reason to hold the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant." Relying on a combination of the "inherent mobility of the suspect", and the magistrate's previous finding of probable cause to believe that the named suspect committed the offense, the court held that these two factors would justify a search for the suspect provided that the police officers reasonably believed he could be found on the premises searched. 379 F.2d at 263.

However, upon further scrutiny of *McKinney's* facts, it becomes apparent that the fugitive was extremely transient, having robbed an Indiana bank, rented a Cleveland apartment, and travelled by auto with appellant to Boston and back. A search warrant was executed at his apartment without result. The FBI also received information about the suspect staying with a few friends of appellant's. Thus, the record demonstrated that this particular fugitive was highly mobile. These facts and the holding suggest that his mobility was viewed by the appellate panel as an exigent circumstance in and of itself, which arguably could then lessen the FBI's duty to obtain search warrants. In fact, the court cited *Johnson* v. *United States*, *supra*, for the proposition that a suspect fleeing or likely to take flight would militate against the necessity of a search warrant. *Ibid.* Therefore, it appears that the holding in *McKinney*, *supra*, turned more on the inherent mobility of this fugitive, than it did upon the novel notion that suspects named in all arrest warrants are inherently highly mobile.

Similarly, in the case *sub judice*, the Fifth Circuit panel specifically followed the previous circuit opinion of *United States* v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), rehearing and rehearing en banc denied, 545 F.2d 420 (5th Cir. 1977). *United States* v. *Gaultney*, 606 F.2d 540, 544 (5th Cir. 1979), petition for rehearing granted in part and denied in part, petition for rehearing en banc denied, 615 F.2d 642 (5th Cir. 1980). The latter *Cravero* panel reversed the former, holding that the arrest war-

rant was an express exception to the search warrant requirement.

> "The law of this circuit . . . is that when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect. (Cites omitted). **** Reasonable belief embodies the same standards of reasonableness [as probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate *and without exigent circumstances*. 545 F.2d at 421. (Note and citations omitted) (Emphasis supplied).

Accord, United States v. *Harper*, 550 F.2d 610 (10th Cir. 1977); *United States* v. *Brown*, 467 F.2d 419 (D.C. Cir. 1972); *Commonwealth* v. *Terebieniec*, 408 A.2d 1120 (Sup. Ct. Pa. 1979).

Petitioner contends that *Cravero* and its progeny create numerous constitutional errors of analysis and misapply to the specific facts of their cases the general principles therein enunciated. In regard to the latter claim, the rule in *Cravero* paints with too broad a brush. *Cravero* allows police officers to ignore the absence of exigent circumstances and to substitute their judgment for the magistrate's, even though there existed in *Cravero* exigent circumstances of the very type catalogued in *Dorman*, *supra*. One suspect was heavily armed and had a reputation for violence. *United States* v. *Cravero*, 545 F.2d at 413, n. 13. The agents cut off

surveillance of the house when it became likely that their informant's "cover had been blown." After the agents knocked on the door and announced possession of arrest warrants, they heard someone inside inform the others of the police pressence. 545 F.2d at 413. Cravero was brandishing a pistol and the agents heard noises from a bathroom. Fearing the existence of the violent fugititve, the agents entered the bathroom, finding another defendant and contraband. *Ibid.* These factors are *themselves* exigent circumstances which distinguish Petitioner's case from the circuit's unnecessarily broad and consititutionally infirm general rule. Under this anlysis, the *Cravero* ruling exceeds the scope of its own facts and gravely erodes the fundamental protections of the Fourth Amendment.

Constitutionally, the *Cravero* rule, as applied in Petitioner's case below, violated this court's holding that "only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970). The government has never shown exigency. "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances." *McDonald* v. *United States*, *supra*, 335 U.S. at 454 (cites omitted). Moreover, the authorization for entry into the third person's home which *Cravero* permits circumvents the warrant procedure that is designed to minimize the dangers of the needless physical intrusions by government agents

that the Fourth Amendment was directed against. *See, generally, Payton* v. *New York*, _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. 3033, 3036 (1980).

In short, the unfettered discretion which *Cravero* places in the hands of government agents armed only with an arrest warrant is made possible only by an implicit rejection (or at least a misreading) of well-reasoned and carefully developed authority in the area of Fourth Amendment law. Such power in the hands of the government is inconsistent with the aims of a free and democratic society.

B. Under the Fourth Amendment, there exists no logical distinction between searches for "persons" and searches for "things".

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The explicit language of the Fourth Amendment, read in light of its history, purpose and judicial application, justifies no logical distinction between police entries to search for "persons" and police entries to search for "things". *Payton* v. *New York*, _____ U.S. _____, 100 S.Ct.1371, _____, 27 Cr.L. 3033, 3036 (1980). Through this amendment, the citizenry is guarded from

"unreasonable searches and seizures" in its "persons, houses, papers and effects." A reading of the final quoted portion comprehends no distinction between "persons" on the one hand and "houses, papers, and effects" on the other. Thus, the purpose and effect of the Fourth Amendment guarantees should apply equally to both categories. By the express terms of the "search and seizure" clause, these categories require the interposition of the judgment of the magistrate between the citizen and the police, so that the prohibition against unreasonable intrusions upon a person's reasonable expectation of privacy, is not abridged. *Katz* v. *United States*, *supra*; *Johnson* v. *United States*, *supra*; *McDonald* v. *United States*, *supra*.

Furthermore, the Amendment, literally read, mandates the issuance of warrants only upon a showing of probable cause, with two additional requirements, namely, particular descriptions of (1) the places to be searched, *and* (2) the persons *or* things to be seized. This unequivocal language not only places persons and things on the same constitutional footing in terms of particularity of description, but would seem to apply to both categories the threshold requirement of particularly describing the place where the warrant shall be executed in order to effect a search *fo.* and seizure of either the person(s) or object(s).

Such a literal construction is consistent with the history, purpose and judicial interpretation of the Amendment. While indiscriminate searches and seizures conducted under the authority of general warrants were

the immediate evils that lead to the Amendment, its final form protected the right to be free from unreasonable searches and seizures and required the warrants issued to be particular and based upon probable cause. The Amendment's history, purpose and interpretation converge into the basic policy of protecting a citizen's reasonable expectation of personal security by interposing between the public and the authorities the shield of the neutral and detached magistrate, who, except in certain circumstances, is charged with the authority to issue search warrants only for a particular place and only after a showing of probable cause.

In *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), this Court, reflecting upon the opinion in *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . they apply to all invasions on the part of the government and its employe's [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and rummaging of his drawers that constituted the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ."

Therefore, since the language of the Amendment "applies equally to the seizures of persons and to seizures of property," *Payton* v. *New York*, _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. 3033, 3036 (1980), and the purpose of the Amendment is to protect against arbitrary governmental violations of a home, a

judicial determination (except in the certain well-defined circumstances) should control any contemplated entry, regardless of whether what is sought is a person or a thing. Thus, the Supreme Court in *Payton*, *supra*, held that "any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind." The Court continued:

> The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the zone of privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'the right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally established the proposition that 'at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' *Silverman* v. *United States*, 365 U.S. 505, 511. *In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.*

_____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. at 3037 (emphasis supplied). *See*, Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stanford L. Rev. 995, 998 (1971)(There appears to be no reason why the constitutional preference for judicial,

rather than police, determination that a named thing is in a named place should not include within its scope the determination that a named person is in a named place); Rotenbert and Tanzer, *Searching for the Person to Be Seized*, 35 Ohio St. L. J., 56, 76 (1974) (No convincing reason why search and seizure procedures do not include search for the person within their protections.)

Petitioner contends that the lack of a logical distinction between searches for persons and searches for things is nowhere clearer than in the situation where the citizen whose guaranteed expectation of privacy is unreasonably invaded is a third person not named in the arrest warrant or a person against whom the evidence sought will not be used. In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), it was recognized that:

> In criminal investigations, a warrant to search for recoverable items is reasonable 'only when there is probable cause to believe that they will be uncovered in a particular dwelling.' Search warrants are not directed at persons; they authorize the search of 'places' and the seizure of 'things', and as a constitutional matter they need not even name the person from whom the things will be seized.

436 U.S. at 555 (cite omitted).

Yet, if the subject of the search were a person named in an arrest warrant, valid under *United States* v. *Cravero*, *supra*, regardless of the lack of any exception to the search warrant requirement or the absence of exigent circumstances, the decision to intrude upon the legitimate expectations of privacy of the third person

would be in the sole discretion of the police officers. The arrest warrant would ensure merely that there had been a judicial finding of probable cause that a particular person had committed a particular offense; no judicial consideration of the place in which the arrest is to be made would exist. The effect is to give the police a dangerous degree of freedom in searching for the person and to invite derrogation of Fourth Amendment guarantees. Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, *supra*, at 997.

As one commentator discerned, "A prior judicial determination of the grounds to arrest the person the police believe is therein would primarily protect that person, who is not deemed entitled to such protection when arrested on the street, but would only indirectly protect the person whose premises are intended to be entered." *W. LaFave*, 2 Search and Seizure, §6.1 (1978).

The better view, and the one constitutionally consistent with the Fourth Amendment, is that the warrantless entry of a dwelling to arrest be put on the same constitutional footing as a warrantless entry of a dwelling to search. Entry in both instances is *per se* unreasonable unless "exigent circumstances" justify the failure to obtain a warrant. *United States* v. *Shye*, 492 F.2d 886, 891 (6th Cir. 1974). "Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence." *Rice* v. *Wolff*, 513 F.2d 1280, 1291 (8th Cir. 1975), rev'd on other grounds, sub nom *Stone*

v. *Powell*, 428 U.S. 465 (1976). See, generally, *United States* v. *Prescott*, 581 F.2d 1343, 1349 (9th Cir. 1978). Only then will third parties be guaranteed the same constitutional protection for the security of their home that they receive when the government seeks to seize inanimate objects from their residences.

C. The "*Cravero* rule" is inconsistent with the reaffirmation of Fourth Amendment doctrine in *Payton* v. *New York*, *supra*.

In *Payton*, *supra*, it was held that "for Fourth Amendment purposes an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. at 3041.

In *Payton*, *supra*, the State, which had legislatively authorized its police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest, argued that only a search warrant based upon probable cause to believe the suspect is at home at a given time can adequately protect the suspect's privacy interests that are at stake. Since that requirement was "manifestly impractical", the State insisted that no warrant of any kind was needed.

The response of this Court adds further support for Petitioner's contention that the Fifth Circuit erred in his case, and that in applying *Cravero*, misapplied Fourth Amendment doctrine. The arrest warrant requirement, this Court held in *Payton*, *supra*, while presumably less

protective of the citizen than a search warrant, "nevertheless suffice[s] to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. at 3041.

Petitioner's case stands in marked contrast to *Payton* and is even less related to *Cravero*. At the time of the raid by the Drug Enforcement Administration agents, Petitioner was not a fugitive, suspect, or for that matter, even known by the agents to be on the premises. As far as they knew, one of those houses on the Carey Court lot was the residence of a Mr. Fisher. Significantly, as far as the record indicates, no law enforcement officer had been before a magistrate on the Ricky Lyons matter for six months. Clearly there was no interposing of a magistrate between these zealous officers and the citizen in this case. The arrest warrant, directed at Lyons, is as protective of Petitioner's privacy interests as no warrant at all, and therefore this unreasonable intrusion cannot be upheld. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

Additionally, since there were no exigent circumstances in Petitioner's case, the competing governmental interests are outweighed by the sanctity of Petitioner's privacy interests in his home. *Payton* v. *New York*, *supra*, 27 Cr.L. 3033, 3041 (Blackmon, J., con-

curring). Therefore, the lack of protection afforded by the arrest warrant to any person but the suspect himself requires that the police apply to the magistrate to obtain judicial authorization for intruding upon the third person's premises.

The holdings and rationales of *Payton* and *Cravero* are patently inconsistent. A crucial point in the case *sub judice* is that the co-existence of the doctrines of *Payton* and *Cravero* will allow police officers to enter, for example, Petitioner's home to arrest "Payton" based on the exact same determinations that police would utilize to enter Payton's own residence to arrest him. Thus, the result would be the same in either case, despite the total dearth of any relation between Petitioner and the facts which gave rise to the issuance of the arrest warrant for the suspect. The arrest warrant, affording no Fourth Amendment protection to Petitioner, therefore violates the Amendment's prohibition against unwarranted intrusions into a citizen's privacy. *Payton* v. *New York, supra,* 27 Cr.L at 3037, n. 26.

Moreover, *Cravero* makes the citizen's expectation of privacy and security a hollow right. It is true, of course, that the "reasonableness of the officer's judgment is always subject to judicial review". *United States* v. *Cravero, supra*, 545 F.2nd at 421. But when the remedy of unlawful police action is restricted to the citizen's right to go into a court of law to seek redress, as opposed to the additional security provided by the knowledge that the police officer is subject to a *prior* judicial approval, the intrinsic value, if not the substance itself of the Fourth Amendment is nullified.

Furthemore, a *Cravero* arrest warrant would allow police, based on thier own determination of probable cause, to make arrest entries without search warrants, whether or not exigent circumstances existed. However, arrest warrants are not substitutes for search warrants. *Rice* v. *Wolff*, *supra*, 513 F.2d at 1280-1281. *Accord, Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3rd Cir. 1974) ("Although police have warrants for the arrest of suspects, they may enter premises, *at least of third persons,* to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." 502 F.2d at 928 (emphasis supplied)); *Fisher* v. *Volz*, 496 F.2d 333 (3rd Cir. 1974) (Arrest warrant, probable cause, *and* exigent circumstances will allow police to dispense with search warrants.)

Moreover, in *Wallace* v. *King*, 626 F.2d 1157 (4th Cir. 1980), the Court held that not only must police officers have an arrest warrant for the suspect and probable cause to believe that he is on the premises sought to be entered but "there must also exist an appropriate exception to the warrant requirement. . . ." Additionally, the Court recognized that:

> Reasonable or probable cause to believe that a person for whom an arrest warrant has been issued is on the premises, standing alone, is not sufficient.
>
> * * *
>
> *An arrest warrant indicates only that there is probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect*

is in a stranger's house." (cite omitted) 626 F.2d at 1161 (emphasis supplied)

In conclusion, "when entry into premises other than those of the person to be arrested is contemplated, then surely it is the protection provided by a search warrant rather than an arrest warrant which is most needed." W. LaFave, 2 *Search and Seizure*, §6.1 (1978). To hold otherwise is to abandon the legacy of the Fourth Amendment.

CONCLUSION

WHEREFORE, Petitioner prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that the evidence seized as a result of the unlawful police entry and search be suppressed in conformance with the dictates of the Fourth Amendment.

Respectfully submitted,

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No. 79-6777

In the Supreme Court of the United States

OCTOBER TERM, 1980

GARY KEITH STEAGALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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GARY KEITH STEAGALD, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether evidence seized in a residence leased to one of petitioner's co-defendants should have been suppressed because law enforcement officers entered, not with a search warrant, but under the authority of an arrest warrant for a fugitive whom they had reason to believe was present.

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OPINIONS BELOW

The opinion of the court of appeals (A. 20-34) is reported at 606 F.2d 540. A subsequent, modifying opinion (A. 35-37) is reported at 615 F.2d 642.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1979. A petition for rehearing was granted in part, and the original opinion was modified on April 14, 1980. On May 13, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 13, 1980. The petition was filed on that date and granted in part on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment, to be followed by a three-year special parole term.[1]

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[1] Petitioner was indicted with three co-defendants (A. 3-5). He originally went to trial with co-defendant Hoyt Gaultney in April 1978. After trial began, the district court granted petitioner's motion for a mistrial and a severance (A. 2), and the trial proceeded with Hoyt Gaultney as the lone defendant. Gaultney was convicted on all three counts of the indictment, which charged him with possessing cocaine with intent to distribute it, conspiracy to commit that offense, and importation of cocaine, in violation of 21 U.S.C. 952(a). Petitioner and the two remaining co-defendants, Kathy Gaultney and James Smith, were tried together a month

1. The evidence at petitioner's trial and at the trial of co-defendant Hoyt Gaultney showed that petitioner and Gaultney operated a scheme to distribute large quantities of cocaine that had been smuggled into this country from Colombia, South America. Petitioner and Gaultney used a dummy company, Rosen Import Co., as a front for their illicit activities. The cocaine was concealed in the hollowed-out wooden bases of lamp tables imported from Colombia. Acting as the manager of Rosen Import, petitioner retained a customs house broker to arrange for clearing the tables through customs. Through the broker, petitioner also hired a delivery company to take the tables to a warehouse petitioner had leased in Lawrenceville, Georgia.

When the tables were delivered, petitioner accepted and signed for the shipment, paid the freight charges with a check drawn on the import company's account, and received a copy of the delivery company's waybill as a receipt. The cocaine was then removed from the lamp tables and taken to a lakeside cabin in Buford, Georgia, leased by petitioner's co-defendant James Smith.

A search of Smith's cabin on January 18, 1978, uncovered approximately 43 pounds of almost pure cocaine, with a wholesale value of more than $2.5 million. Also found in the cabin were the copy of the freight company waybill received by petitioner when

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later. At the close of the government's evidence, the district court granted a judgment of acquittal to Smith and Kathy Gaultney but denied petitioner's motion for a similar disposition (Tr. 276). The court of appeals affirmed petitioner's convictions and those of Hoyt Gaultney in a joint opinion.

"Tr." refers to the transcript of petitioner's trial, which comprises two consecutively paginated volumes. "H. Tr." refers to the transcript of the suppression hearing, which includes three separately paginated volumes.

the tables were delivered to the Lawrenceville warehouse and two blank checks on the import company account, bearing the next two consecutive numbers to that on the check used by petitioner to pay the freight charges. A subsequent search of the Lawrenceville warehouse revealed another pound of cocaine still hidden in one of the table bases (A. 24 & n.4, 28-30; Tr. 18-28, 50-54, 58-60, 64, 98-100, 117-124, 133-138, 151, 157-162, 167-172, 177, 181, 184, 191, 193, 197-198, 209-218, 220-227).

2. The circumstances surrounding the search of the cabin leased to James Smith are described in the opinion of the court of appeals (A. 21-24) and the magistrate's report and recommendation on the motion to suppress evidence filed by petitioner and his co-defendants (A. 6-11). In early January 1978, DEA Agent Joseph Rassey was contacted by an informant whom he had known for about five years and who had provided him with information leading to seven arrests for drug-related offenses, three of which resulted in convictions and four of which were still pending (A. 13, 21 n.2; 1 H. Tr. 16-18; 2 H. Tr. 33-36, 51). The informant said he might be able to locate "Ricky Lyons," whom he believed to be wanted by the DEA, and another person named "Jimmy," whom he also believed to be a fugitive. On Saturday, January 14, 1978, the informant called Agent Rassey and said that he had received a call from Jimmy, who was using the alias "Carl James" and who was wanted on Georgia state charges (1 H. Tr. 16-17; 2 H. Tr. 36-37). According to the informant, Jimmy had given him a telephone number in the Atlanta, Georgia, area where Jimmy and Ricky Lyons could be reached within the next 24 hours. Agent Rassey spoke to the informant again on Monday morning, January 16. The informant said he had just talked

with Jimmy by telephone and had heard Lyons' voice in the background (2 H. Tr. 37-38).[2]

Shortly after this conversation with the informant, Agent Rassey called DEA Agent Kelly Goodowens in Savannah, Georgia, and relayed the information he had received from the informant (1 H. Tr. 16-18; 2 H. Tr. 37). Agent Goodowens was aware that six months earlier Ricky Lyons had been indicted in the United States District Court for the Southern District of Georgia on charges of marijuana smuggling. On further investigation, Agent Goodowens learned that a federal warrant had been issued for Lyons' arrest and that he remained a fugitive (A. 22). The DEA considered Lyons armed and dangerous (1 H. Tr. 14; 2 H. Tr. 32). Special Agent Wayne Smith of the DEA Atlanta office had participated in an earlier investigation in which Lyons was involved and knew him to be a "fairly violent person" (2 H. Tr. 53-54). Weapons and dynamite had been found in Lyons' residence on past occasions (*ibid.*).

Soon after his conversation with Agent Rassey, Agent Goodowens learned through the Southern Bell Telephone Company that the telephone number that Jimmy had given to the informant was listed to Richard E. Fisher at 6291 Cary Drive, Buford, Georgia (1 H. Tr. 18-19). Goodowens enlisted the help of the Gwinnett County Police to locate the address but they were unable to find it that day (Monday, January 16) (1 H. Tr. 19). On Wednesday morning, January 18, 1978, Agent Goodowens requested Southern Bell to obtain from its workmen detailed directions to the address at which the Fisher telephone had

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[2] The informant had known both Jimmy and Lyons for several years and told Agent Rassey that he could definitely recognize their voices (2 H. Tr. 37-38, 47).

been installed (1 H. Tr. 19-20). The telephone company provided this information early in the afternoon of January 18, and, with the aid of the Gwinnett County Police, Agent Goodowens determined that the correct address was on Cary Court, not Cary Drive (1 H. Tr. 20).

At approximately 2:00 p.m. the same afternoon, Agent Goodowens again spoke with Agent Rassey, who reported that he had had several conversations with his informant during the period from January 16 to January 18, 1978, that he had talked with the informant most recently on the morning of January 18, and that in each of these conversations the informant had said that he was keeping in touch with Jimmy and that Jimmy and Lyons were still located at the telephone number reported earlier. According to the information relayed by Agent Rassey, a total of four or five persons were staying at the house where Jimmy and Lyons were, and the informant did not know how much longer Jimmy and Lyons would be there (A. 7; 1 H. Tr. 18, 20, 48, 78; 2 H. Tr. 5, 38-39, 48-49).

Because Agent Goodowens had never seen Ricky Lyons, he asked Agent Wayne Smith to assist in the arrest. At approximately 4:00 p.m. on January 18, Agent Goodowens and Agent Smith, together with assisting federal and state officers, went to the Cary Court address, which was in a rural area of Georgia, near a lake (1 H. Tr. 21, 45, 79; 2 H. Tr. 3-5, 53-54, 103). Two buildings appeared to share a mailbox on which the address was printed. One, an A-frame, appeared unoccupied. The other, a small cabin, had smoke coming from the chimney and an old Volkswagen parked in the driveway (1 H. Tr. 23-24). As Agents Goodowens and Smith and another officer approached the cabin, they noticed two men squatting

behind the Volkswagen. The agents asked the men for identification. Agent Smith at first thought that one of the men was Lyons, but he quickly realized that he was mistaken. The man identified himself as Hoyt Albert Gaultney; the second man, petitioner, produced a driver's license in his own name. The agents knew that Gaultney had been arrested previously, and they believed him to be dangerous. They frisked him and discovered a gun concealed in his pants (1 H. Tr. 24-26, 36, 56-57, 69, 71; 2 H. Tr. 55-56, 75, 103-106).

As soon as Agent Smith realized that neither man was Lyons, he proceeded to the cabin. He knocked on the door, and Kathy Gaultney, Hoyt Gaultney's wife, answered. Agent Smith identified himself as a police officer and said that he was there to execute an arrest warrant. He asked if he could enter the cabin, and she acquiesced. Agent Smith inquired whether Ricky Lyons was present, and Kathy Gaultney responded, "No one by that name here. I'm here by myself." While another officer watched Kathy Gaultney, Agent Smith made a sweep search of the cabin for Lyons (1 H. Tr. 29; 2 H. Tr. 55-57, 76-77).

The cabin contained four rooms, a combination kitchen-living room into which the officers had entered, two bedrooms, and a bathroom. Agent Smith first looked into the bathroom and then proceeded to one of the bedrooms, from which a light was shining beneath the door. In this room, Agent Smith saw a sewing table, on which were a set of triple-beam balance scales and a transparent plastic bag containing a white powder. Agent Smith then completed his sweep search of the cabin; he found neither Lyons nor anyone else. Agent Smith returned to the Volkswagen outside and told Agent Goodowens that he had

not found Lyons but that he believed he had found some cocaine.

Agent Smith then drove to Atlanta to obtain a search warrant for the cabin. While he was gone, Agent Goodowens walked into the first bedroom to verify Smith's discovery. Agent Goodowens noticed a suitcase lying open on the bed. It contained an open green garbage sack in which several bags of white powder were plainly visible.[3] Petitioner and the Gaultneys were then arrested and brought into the living room to await the search warrant (1 H. Tr. 29-33, 63, 69, 96-97; 2 H. Tr. 56-63, 72, 76-78).

While they were waiting, Hoyt Gaultney asked to speak privately with DEA Agent James Williams in the second bedroom (*i.e.*, not the one in which the cocaine had been discovered). Fearing that Gaultney might attempt to gain access to a weapon, Agent Goodowens first searched the room, including a grey suitcase in the bedroom closet. Inside the suitcase he found "what appeared to be drug paraphernalia" (1 H. Tr. 37; see also *id.* at 110-112).[4] He also found a knife lying on top of a bunkbed. Soon thereafter, Gaultney confessed to Agent Williams that 50 pounds of cocaine were hidden inside the house. He led Agent Williams back to the first bedroom, where he pointed to a brown suitcase in an open closet and said, "there it is" (1 H. Tr. 35-38, 96-97; 3 H. Tr. 4-11, 22, 29-32).

At approximately 7:25 p.m., a man calling himself "Jimbo" telephoned the cabin and said that he would be returning there shortly. Agent Goodowens, who

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[3] Agent Smith had not noticed the suitcase (2 H. Tr. 78).

[4] Further investigation after a search warrant was obtained revealed that the suitcase contained approximately one pound of a white, powdery, non-controlled substance called mannitol, which is used as a cutting agent for cocaine (1 H. Tr. 37-38).

took the phone call, believed that Jimbo was the person he and the other officers knew as Jimmy. (Earlier, the agents had asked Hoyt Gaultney about Jimmy, and Gaultney responded, "That's Jimbo. He's staying here" (1 H. Tr. 100-101).) When Agent Goodowens told the group that Jimbo would be arriving soon, Hoyt Gaultney said that Jimbo "would probably be carrying a gun and he would not hesitate to use it under the right circumstances" (2 H. Tr. 7).

Five minutes later, Agent Smith called from Atlanta and told the officers that the search warrant had been issued. During this telephone conversation, petitioner's co-defendant James Smith and his wife arrived at the cabin in a pick-up truck. Agent Goodowens frisked Smith when he entered the cabin and found that he was carrying a gun. Smith identified himself only as "Jimmy." He also produced a driver's license in the name of "Carl James." [5] The officers then proceeded to search the house in accordance with the warrant. They found narcotics paraphernalia, weapons, and approximately 43 pounds of almost pure cocaine. When Agent Smith returned to the cabin later in the evening, he searched James Smith's truck for identification. He found instead a briefcase containing pills, marijuana, Polaroid photographs of plastic bags of white powder and what appeared to be bales of marijuana, two or three letters addressed to Ricky Lyons, and a stolen handgun. The agents finally learned Jimmy's true identity when he was processed at the DEA office later that night (1 H. Tr. 34-35, 68, 102-110; 2 H. Tr. 7-8, 21-23, 66-70, 95-97, 99).[6]

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[5] Earlier, the agents had found a traffic ticket on a table in the cabin. It had been issued to "Carl James" (1 H. Tr. 101).

[6] The following day, the agents procured a second search warrant to search the contents of a plaid suitcase and other items found

3. Petitioner and his co-defendants moved to suppress all the evidence discovered during all the searches. They contended that Agent Smith's initial entry into the cabin was improper and that all the evidence subsequently discovered was the fruit of this unlawful entry. At the suppression hearing, counsel for the Gaultneys asked Agent Goodowens whether he could have obtained a search warrant before entering the cabin. The agent responded, "I don't know. A search warrant for what, sir? I had an arrest warrant" (App., *infra*, 1a). When questioned further, he stated that he did not know how long Ricky Lyons was supposed to remain at the Cary Court address but that there had been no "physical hindrance" that prevented him from obtaining a search warrant (*id.* at 2a).

The district court, adopting the exhaustive findings and recommendations of the magistrate who presided at the suppression hearing (A. 6-17), held that the initial entry was lawful because the officers had an arrest warrant for Lyons and a reasonable belief that he was at the Cary Court address. The court suppressed the evidence found in the grey suitcase opened by Agent Goodowens, before a search warrant was obtained, in the bedroom where Gaultney gave his statement to Agent Williams. The court also suppressed the evidence seized from James Smith's pick-up truck. In all other respects, the court denied defendants' motion.

The court of appeals affirmed on the basis of its earlier decision in *United States* v. *Cravero*, 545 F. 2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S.

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within the house. Subsequently, law enforcement officers obtained two additional warrants authorizing the search of the Lawrenceville warehouse and a storage bin at another warehouse (1 H. Tr. 38-39, 66; 2 H. Tr. 70-71).

1100, 430 U.S. 983 (1977). That case held that a police officer who possesses a valid arrest warrant and who reasonably believes that the subject of the warrant is in a third party's residence need not obtain a search warrant to enter the premises for the purpose of arresting the subject. Judge Kravitch dissented. She thought that the agents' basis for believing that Lyons was at the cabin was insufficient to satisfy the *Cravero* "reasonable belief" standard and that, in any event, *Cravero* had stated "a rule of questionable validity and wisdom" (A. 32-34, 37).

SUMMARY OF ARGUMENT

The petition in this case presents an important and unsettled question of Fourth Amendment law. Last Term, in *Payton* v. *New York*, 445 U.S. 573 (1980), the Court held that, in the absence of either exigent circumstances or consent, the Fourth Amendment prohibits law enforcement officers from making warrantless entries into a suspect's home in order to arrest him on criminal charges. The Court concluded that arrest entries into a suspect's residence are not constitutionally permissible unless the officers have (1) an arrest warrant based on a magistrate's determination that there is probable cause to believe that the person named in the warrant committed a crime, and (2) reason to believe that the suspect is present inside the premises. The substantive Fourth Amendment question presented in this case is whether something more than an arrest warrant and reason to believe is necessary before officers may enter the premises of a "third party" for the purpose of arresting a suspect. Relying heavily on *Payton* v. *New York*, *supra*, petitioner contends that in this situation only a search warrant specifying the premises to be entered is sufficient to satisfy the Fourth Amendment privacy interests of the occupants of

third party premises. While the issue is a close one, we disagree with petitioner's contention. This is not, however, an appropriate case to address the merits of the Fourth Amendment issue, both because there is a serious question whether petitioner's Fourth Amendment rights were implicated by the entry and because, in the circumstances of this case, the exclusionary rule should not be applied to suppress the evidence acquired as a result of the entry.

I

There is a substantial threshold question whether petitioner had any valid interest in the Cary Court premises that was protected by the Fourth Amendment and that may have been violated by the DEA agents' entry and ensuing sweep search. Petitioner and his co-defendants were charged with possession of the cocaine found inside the cabin, but the record contains little or no evidence demonstrating petitioner's privacy interest in the cabin, which he was not in at the time of the entry. Because this case was tried and the resulting convictions were affirmed before this Court's decision in *United States* v. *Salvucci*, No. 79-244 (June 25, 1980), the courts below proceeded on the premise that petitioner had "automatic standing" to challenge the entry and search, and did not inquire into petitioner's connection with the premises in order to determine whether he had a reasonable expectation of privacy in any of the areas of the cabin where incriminating evidence was found. Accordingly, the Court may wish to remand the case for further proceedings on this issue.

II

The entry and search in this case occurred in January 1978. At that time, the agents' conduct was lawful under established Fifth Circuit precedent. See

United States v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100, 430 U.S. 983 (1977). The decision in *Payton* v. *New York*, *supra*, which was rendered more than two years later, marked a sharp break in the law regarding arrest entries.

Petitioner, however, asks the Court to interpret and extend *Payton* and to apply the resulting legal principles to a search that took place long before *Payton* was announced. Before the Court decides whether *Payton* should be so interpreted and extended, it should consider whether *Payton*, whatever its implications, should be applied retroactively to suppress the fruits of the search in this case. See *Bowen* v. *United States*, 422 U.S. 916 (1975); *Michigan* v. *Payne*, 412 U.S. 47 (1973); *DeStefano* v. *Woods*, 392 U.S. 631 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967). In each of the foregoing cases, the Court declined to decide whether an earlier ruling should be extended to govern law enforcement conduct occurring prior to rendition of the decision but in circumstances somewhat different from those considered in the previous case. Instead, the Court concluded in each instance that retroactive application of the earlier decision was inappropriate and terminated its inquiry at that point.

Unlike the foregoing cases, however, petitioner's legal position arguably could be adopted even if *Payton*, the earlier decision on which he relies, had been decided differently. Nevertheless, *Payton* represents an important development in Fourth Amendment law governing arrest entries. Before exploring the legal ramifications of that development and excluding evidence obtained as a result of law enforcement conduct that fails to measure up to evolving constitutional standards, the Court should await a case aris-

ing from a post-*Payton* search, in which the police were already on notice that the *Cravero* rule might no longer be good law. Thus, unless *Payton* is to be applied retroactively, suppression of the challenged evidence is inappropriate here.

Under settled principles, *Payton* should not be given retroactive effect. No possible deterrent purpose would be served by excluding the fruits of searches and seizures that law enforcement officers did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. Furthermore, the extent of reliance by law enforcement officers on the pre-*Payton* rule and the burden on the administration of justice that would flow from retroactive application also militate in favor of applying *Payton* prospectively only. The Court in *Payton* acknowledged that the majority rule favored warrantless arrest entries and that the practice was "longstanding" and "widespread." No other new Fourth Amendment ruling has been held retroactive by this Court, and there is no reason to treat *Payton* differently.

III

Petitioner argues that the protection afforded by an arrest warrant is insufficient in the case of arrest entries into third party dwellings. It is his position that only a search warrant based on a magistrate's particularized determination that there is probable cause to believe that the suspect is present in a third party's residence is sufficient to justify the intrusion upon the third party's privacy interests. While petitioner's argument has considerable force, we submit that both history and practical considerations counsel against adoption of his position.

At common law, it appears to have been well settled that a constable could enter the premises of a

third party in order to execute an arrest warrant for a felon, so long as he had reason to believe that the person named in the warrant was present. It is therefore highly unlikely that the Framers intended to invalidate such entries as unreasonable when they enacted the Fourth Amendment.

In addition, an arrest warrant does provide a third party homeowner with some of the same protections afforded by a search warrant. It is issued only after the magistrate has found probable cause to believe that the named individual has committed a crime, and it constitutes evidence of the officer's authority and purpose. At the same time, we recognize that interposition of a magistrate to make a particularized determination that the suspect is present in a third party's house provides additional protection not available through an arrest warrant. But the question remains whether the increased protection to privacy interests outweighs the substantial practical problems involved in complying with a search warrant requirement. Unlike things, people—particularly people suspected of crime—are highly mobile. A warrant authorizing entry of a particular place to search for a particular person is considerably more likely to be stale at the time it is issued, or shortly thereafter, than one authorizing a search for inanimate objects. Furthermore, it may be difficult, if not impossible, for the police to know the suspect's relationship with the premises and how long he is likely to remain there. In light of these considerations, we submit that an arrest warrant, coupled with the officer's determination of reason to believe, is sufficient to satisfy the Fourth Amendment's standard of reasonableness.

ARGUMENT

I. THE RECORD STRONGLY SUGGESTS THAT THE ENTRY INTO THE CABIN WHERE THE COCAINE WAS FOUND, EVEN IF UNLAWFUL, DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS

If petitioner had a reasonable and legitimate expectation of privacy in the Cary Court cabin, that expectation was implicated when Agent Smith entered in an attempt to execute the arrest warrant for Ricky Lyons. There is a substantial threshold question, however, concerning whether petitioner in fact had such an expectation. In the absence of such an expectation, petitioner's Fourth Amendment rights would not have been violated by the entry and ensuing sweep search, regardless of the legality of the agents' conduct as far as petitioner's co-defendants were concerned. *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

The matter of petitioner's expectation of privacy in the Cary Court cabin and, in particular, in the bedroom where Agent Smith discovered cocaine, was not specifically explored at the suppression hearing or at trial. The indictment charged petitioner and his co-defendants with possessing the cocaine found in the cabin (A. 3), and the case was tried and the resulting convictions were affirmed on appeal before this Court's decision in *United States* v. *Salvucci*, No. 79-244 (June 25, 1980). Accordingly, because petitioner was charged with a possessory offense, all participants in the courts below believed he was entitled to "automatic standing" under *Jones* v. *United States*, 362 U.S. 257 (1960). For that reason, neither the magistrate nor the district court inquired into petitioner's connection with 6291 Cary Court in order to determine whether he had a reasonable expec-

tation of privacy in any or all of the areas inside the cabin where incriminating evidence was found.

We hasten to add, however, that at petitioner's trial the government had every incentive to adduce the greatest possible amount of evidence linking petitioner with the cabin. The prosecution was trying, after all, to link petitioner to the cocaine found inside. Even after the thorough, warrant-authorized searches of the cabin and its contents, the government was able to identify only three items of evidence that tended to show that petitioner had ever been inside (A. 29). These were:

(1) the copy of the freight waybill (found in the dining area) that petitioner received and signed when the cocaine-laden lamp tables were delivered (Tr. 64);

(2) two blank checks (found in the kitchen) on the Rosen Import account, for which petitioner was an authorized signator; the checks were numbered consecutively to the check that petitioner had signed and given to the delivery company in payment of the freight charges for delivery of the lamp tables (Tr. 64); and

(3) a sweater belonging to petitioner (also found in the kitchen), which petitioner asked one of the DEA agents to retrieve for him when he was detained near the Volkswagen, while wearing only slacks and a long-sleeved shirt (Tr. 91-93).

Petitioner argued vigorously on appeal that this evidence, together with the other evidence connecting him to the cocaine distribution scheme,[7] was in-

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[7] The additional evidence against petitioner is summarized in the court of appeals' opinion (A. 28-30). Petitioner arranged and paid for a telephone answering service for Rosen Import Co., and he also arranged and paid for the rental of the warehouse in Law-

sufficient to support his convictions. The court of appeals rejected the argument (A. 28-30), and petitioner does not repeat it here, but the very fact that the contention was advanced in the court below and that that court thought it necessary to discuss the argument in some detail demonstrates that the evidence of petitioner's connection to the cabin was far from overwhelming.

Certainly, neither the government nor petitioner presented any evidence, either at the suppression hearing or at trial, that tended to show that petitioner lived in the cabin or had stayed there overnight. And, of course, petitioner was not in the cabin when the DEA agents arrived there on January 18. The uncontroverted evidence at both the hearing and the trial established that petitioner's co-defendant James Smith, using the name "James Travis," had leased the cabin from its owner, Richard Fisher (2 H. Tr. 68; Tr. 97-106).[8]

Petitioner bears the burden of proving that he had a reasonable and legitimate expectation of privacy in the Cary Court cabin and, especially, in the bedroom where Agent Smith discovered the cocaine. *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 6; *Rakas* v. *Illinois*, *supra*, 439 U.S. at 131 n.1; *Simmons* v. *United States*, 390 U.S. 377, 389-390 (1968). Because of the state of the law at the time of petitioner's trial, he has not yet been called upon to meet that burden, and he has not done so. Before

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renceville, Georgia, where the cocaine-laden tables were delivered. In addition, petitioner arranged and paid for the delivery of the tables to Rosen Import and their passage through customs.

[8] The government's brief in opposition in this case characterized the cabin as "petitioner's residence" (Br. in Opp. 1) and stated that it was "occupied by petitioner Gaultney, and Gaultney's wife" (Br. in Opp. 3). However, a closer review of the record in connection with the preparation of this brief has revealed that those statements were mistaken.

deciding any of the other questions in this case, the Court may wish to remand it to the district court for a determination whether petitioner had any valid interest in the cabin that was protected by the Fourth Amendment and that may have been violated by the DEA agents' entry and search on January 18, 1978. See, *e.g.*, *United States* v. *Salvucci*, *supra*, slip op. 11-12; *Combs* v. *United States*, 408 U.S. 224 (1972). At a minimum, such a remand should be ordered in the event the Court resolves the other matters presented here against the government and therefore reverses the judgment of the court of appeals.[9]

II. THE CHALLENGED EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE ENTRY AND SEARCH COMPLIED FULLY WITH THE APPLICABLE FIFTH CIRCUIT LAW AT THE TIME IT OCCURRED, AND THIS COURT'S DECISION IN *PAYTON* v. *NEW YORK* MARKS A SHARP BREAK IN THE LAW REGARDING ENTRIES FOR THE PURPOSE OF EFFECTING AN ARREST

The search in this case occurred on January 18, 1978. The court of appeals completed its consideration of petitioner's appeal on April 14, 1980. This Court decided *Payton* v. *New York*, 445 U.S. 573, on April 15, 1980, more than two years after the search. At the time law enforcement officers entered the Cary Court house in an effort to arrest Richard Lyons, their conduct was lawful under established Fifth Circuit law. The court of appeals had clearly ruled that "when an officer holds a valid arrest war-

[9] Because the district court and the court of appeals sustained the entry and search in this case in reliance on the governing Fifth Circuit law regarding entries into third-party dwellings for the purpose of executing an arrest warrant, the courts below had no occasion to consider whether Agent Smith's entry into the cabin may have been justified by consent or exigent circumstances. These matters, too, should be open to inquiry on remand if the Court resolves the remaining issues against the government.

rant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect." *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100, 430 U.S. 983 (1977).[10] See also A. 24-25, and cases there cited.

In the present case, the existence of a valid warrant for Lyons' arrest is undisputed. In addition, the court of appeals determined (A. 25) that "the agents had objective grounds for forming a reasonable belief that the fugitive was present at the premises in question when they entered." This Court denied that portion of the petition for certiorari that sought to challenge the latter aspect of the court of appeals' decision. Accordingly, there is no remaining controversy regarding the propriety of the entry, at the time it occurred, under the law in the Fifth Circuit.

Moreover, the Fifth Circuit had unmistakably aligned itself with the majority of American jurisdictions which, for many years before *Payton*, had permitted completely warrantless entries into the

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[10] The court in *Cravero* stated that its reference to the officer's "reasonable belief" about the location of the suspect was intended to embody the same standards of reasonableness contained in the more common "probable cause" formulation. The court explained (545 F.2d at 421):

> The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a search warrant. When one says "probable cause", therefore, one also says either "magistrate" or "exigent circumstances." Reasonable belief embodies the same standards of reasonableness but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

dwelling of a person whom the police had probable cause to arrest, whenever law enforcement officers also had reason to believe the person was present in his dwelling. See, *e.g.*, *United States* v. *Savage*, 564 F.2d 728 (5th Cir. 1977); *United States* v. *Hofman*, 488 F.2d 287 (5th Cir. 1974); *United States* v. *Wysocki*, 457 F.2d 1155 (5th Cir.), cert. denied, 409 U.S. 859 (1972). See also *United States* v. *Williams*, 573 F.2d 348, 350 (5th Cir. 1978) (decided four months after the search in this case; the court stated that "until the Supreme Court declares otherwise, the question is settled in the Fifth Circuit"). See generally *Payton* v. *New York*, *supra*, 445 U.S. at 575-576 & nn. 3, 4, 598-600; *id.* at 612-614 (White, J., dissenting); ALI, *Model Code of Pre-Arraignment Procedure* § 120.6 and accompanying commentary, at 19-21, 306-314 (Proposed Official Draft 1975). *Payton* effected an important change in the law in the numerous jurisdictions, including the Fifth Circuit, that followed this majority rule.

Petitioner now relies heavily on *Payton* in support of his challenge to *Cravero* and the other Fifth Circuit precedents, followed by the court of appeals in this case, regarding entries into so-called third-party premises on the strength of an arrest warrant for a fugitive who the police reasonably believe can be found there. See Pet. Br. 14, 18, 28-29, 32-36. He contends that, just as the Fourth Amendment requires something more than probable cause to justify an entry into a suspect's own dwelling for the purpose of arresting him, so the Amendment requires something more than an arrest warrant and reason to believe a suspect is present to justify an entry into someone else's dwelling for the purpose of effecting an arrest.

Whatever the merits of this interpretation and extension of *Payton*—a matter we take up in Point

III, *infra*—petitioner's argument should not result in the suppression of evidence in this case. *Payton* marked a sharp break in the law. The search in this case occurred before *Payton* and was conducted by officers who acted in good-faith reliance on the controlling precedents in the Fifth Circuit (see App., *infra*, 1a-2a). Although this Court had observed on several earlier occasions that the question resolved in *Payton* was an open one,[11] law enforcement officers in the Fifth Circuit could not have been expected to anticipate this Court's decision more than two years before it was announced and, on that basis, to conform their conduct to the possible ruling requiring a warrant rather than to the rule actually adopted by the court of appeals. This is particularly so because the court of appeals adhered to what was then the majority view on the *Payton* question. Indeed, more than half of the federal and state cases cited by this Court in *Payton* as precursors of its invalidation of "routine" warrantless entries into the dwelling of a suspect for the purpose of arresting him (see 445 U.S. at 575-576 nn. 3, 4) were decided after the search in this case had already occurred.[12]

Petitioner asks the Court to interpret and extend *Payton* and then to apply the legal principles so derived to a search that took place long before the Court spoke in April 1980. The situation thus presented is highly similar to the ones confronted by the Court in *Bowen* v. *United States*, 422 U.S. 916

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[11] See *United States* v. *Watson*, 423 U.S. 411, 418 n.6 (1976); *id.* at 432-433 (Powell, J., concurring); *id.* at 433 (Stewart, J., concurring); *Gerstein* v. *Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480-481 (1971); *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958).

[12] We use the adjective "routine" to refer to those warrantless entries not justified by exigent circumstances, consent, or some other factor apart from probable cause to arrest.

(1975); *Michigan* v. *Payne*, 412 U.S. 47 (1973); *DeStefano* v. *Woods*, 392 U.S. 631 (1968); and *Stovall* v. *Denno*, 388 U.S. 293 (1967). In each of those cases, the Court was asked to apply a recent decision to events that (i) were somewhat different from the ones actually considered in the previous case and (ii) had occurred before the case was decided. In each instance, the Court turned first to the question whether the precedent invoked should be applied retroactively. Concluding in each instance that retroactive application was inappropriate, the Court declined to decide whether the earlier ruling would in fact have had the effect claimed for it, if the somewhat different factual situation then before the Court had arisen after the earlier decision.[13] The majority opinion in *Bowen* observed (422 U.S. at 920; citations omitted):

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. This practice is rooted in our reluctance to decide constitutional questions unnecessarily.

In *Bowen*, the Court was asked to interpret and extend its decision in *Almeida-Sanchez* v. *United*

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[13] Fortuitously, another case presenting the question raised in *Bowen*, but involving events occurring *after* the arguably controlling precedent, was decided by the Court on the same day as it decided *Bowen*. See *United States* v. *Ortiz*, 422 U.S. 891 (1975). Accordingly, the application of the critical precedent to the *Bowen* situation was made clear by the Court on the very day that the Court refused to apply that precedent to Bowen himself. This was purely coincidental, however. Indeed, although the Ninth Circuit had affirmed Bowen's conviction on the same nonretroactivity reasoning ultimately adopted by this Court, the Court nonetheless took pains to admonish the court of appeals for including in its opinion a statement of its views on how the earlier decision of this Court would have affected the outcome had the operative events occurred after, rather than before, that decision. See 422 U.S. at 920-921.

States, 413 U.S. 266 (1973), and to apply that decision to a search that preceded it. *Almeida-Sanchez* held that the Fourth Amendment forbids Border Patrol officers from using roving patrols to search vehicles, without probable cause, at points removed from the border and its functional equivalents. Bowen asked the Court to extend this rule to cover searches at fixed checkpoints away from the border. The Court held that the proper way to dispose of the case was first to decide whether *Almeida-Sanchez* should be applied retroactively to searches occurring before the case was decided. Having decided that *Almeida-Sanchez* should not be given retroactive effect (see *United States* v. *Peltier*, 422 U.S. 531 (1975)), the Court said it was inappropriate to inquire further into the implications of *Almeida-Sanchez* for the fixed checkpoint situation.

Similarly, in *Michigan* v. *Payne*, *supra*, the Court was asked to interpret its decision in *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969), and to apply that decision to a sentence imposed prior to the decision in *Pearce*. *Pearce* held that, under the Due Process Clause, whenever a judge imposes a more severe sentence on a defendant after a new trial, three requirements must be satisfied: (i) the reasons for the higher sentence "must affirmatively appear" in the record; (ii) "[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding;" and (iii) "the factual data upon which the increased sentence is based must be made part of the record" (*id.* at 726). In *Pearce*, the State offered no justification for the increased sentence "beyond the naked power to impose it" (*ibid.*). The Court therefore did not permit the sentence to stand. In *Payne*, by contrast, the State and the sentencing

judge did advance a purported justification for the increased sentence after a new trial. This Court declined to consider whether that justification was adequate after *Pearce*, because it held that *Pearce* should not be applied retroactively to resentencings that occurred before the case was decided.

DeStefano v. *Woods*, 392 U.S. 631 (1968), and its companion case, *Carcerano* v. *Gladden*, provide a third example. Petitioners' requests for relief in those cases would have required the Court to interpret and extend its decisions in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and to apply those decisions to trials held before the decisions in *Duncan* and *Bloom*. *Duncan* held that "the States cannot deny a request for jury trial in serious criminal cases," and *Bloom* held that "the right to jury trial extends to trials for serious criminal contempts." 392 U.S. at 632. DeStefano argued that a contempt punishable by one year's imprisonment is sufficiently serious to require a jury trial. Carcerano argued that his right to a jury trial entailed a right not to be convicted except by unanimous verdict. The Court declined to consider whether the Sixth and Fourteenth Amendments would require the results advocated by petitioners, because it held that *Duncan* and *Bloom* should not be applied retroactively.

Finally, *Stovall* v. *Denno*, 388 U.S. 293 (1967), is instructive in this regard. Petitioner there could have been afforded relief only if the Court had interpreted and extended *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), and had applied those cases retroactively. *Wade* and *Gilbert* established the rule that, in order to safeguard the right of a criminal defendant to the effective assistance of counsel for his defense, identification evidence derived from a *post-indictment*

lineup at which the defendant was not represented by counsel cannot be admitted at the defendant's trial. Stovall asked the Court to exclude identification evidence derived from an informal confrontation with his alleged victim two days after the offense occurred. The Court did not pause to consider whether the rule of *Wade* and *Gilbert* should govern confrontations that occur *prior* to the filing of formal charges against the prospective defendant. Rather, the Court simply held that *Wade* and *Gilbert* should not be applied retroactively.

The reasoning of these past cases should control the disposition of the present controversy. Petitioner contends that, because the Court in *Payton* has held that the Fourth Amendment ordinarily requires *some* judicial scrutiny before an entry into a suspect's dwelling in order to arrest him, the Amendment also requires some *further* degree of scrutiny before an entry into a third party's dwelling to arrest a suspect for whom the police have an arrest warrant and who they have reason to believe is there. In a real sense, petitioner's argument depends on the decision in *Payton*. He seeks to rely on that decision to change the law of the Fifth Circuit, not only with respect to warrantless arrests of a suspect within his own dwelling, but also with respect to entries for the purpose of executing an arrest warrant in a third-party's dwelling. Before the Court decides whether *Payton* should be so interpreted and extended, it should consider whether *Payton*, whatever its implications, should be applied retroactively to the search in this case, which occurred more than two years before *Payton* was decided.

To be sure, the present case may be distinguished in one respect from *Bowen*, *Payne*, *DeStefano*, and *Stovall*. In each of those cases, the criminal defend-

ant's argument could not conceivably have been accepted if the Court had decided the earlier, potentially controlling, case differently. For example, Bowen could not have hoped to prevail with respect to fixed checkpoint searches if the Court had endorsed roving patrol searches without probable cause in *Almeida-Sanchez*. Payne could not possibly have succeeded in challenging his new sentence as a violation of due process if *Pearce* had held that the Due Process Clause does not impose any constraints on the imposition of a higher sentence after a new trial. The contentions of DeStefano and Carcerano bore a similar relationship to the decisions in *Duncan* and *Bloom*, and Stovall's argument likewise would have been rejected *a fortiori* if the Court had ruled differently on the post-indictment identification procedures at issue in *Wade* and *Gilbert*.

Here, by contrast, petitioner's legal position arguably could be adopted even if the State had prevailed in *Payton*. In that event, petitioner's contention would be that, however appropriate it may be to dispense with a warrant requirement for an arrest of a suspect in his own dwelling, the independent privacy interest of a third-party in *his* dwelling nevertheless remains sufficient to necessitate a search warrant before the police may enter to execute an arrest warrant for a suspect who they reasonably believe is present. Scrutiny by a neutral judicial officer is necessary, petitioner could argue, because the entry of a third-party's dwelling entails an invasion of a legitimate expectation of privacy that exists separate and apart from the justification for arresting a person who happens to be present on the premises.

Notwithstanding this analytical distinction, however, we believe that the procedure followed in *Bowen*, *Payne*, *DeStefano*, and *Stovall* should guide the

Court's action in the present case. Petitioner seeks to suppress highly relevant evidence seized by law enforcement officers acting in accordance with established law in their jurisdiction—law that, at the time of the search, at least, was not contrary to any decisions of this Court. In this situation, petitioner should bear the burden of showing a compelling justification for the application of the exclusionary rule. See *United States* v. *Peltier*, *supra*, 422 U.S. at 542.

Criminal defendants have often carried this burden by arguing in a particular case that only by affording such a remedy can the Court correct unconstitutional practices that have received widespread endorsement from the lower courts and, at the same time, avoid the problem of rendering an advisory opinion that runs afoul of the "case or controversy" requirement of Article III of the Constitution. See, *e.g.*, *Stovall* v. *Denno*, *supra*, 388 U.S. at 300-301.[14] Here, however, because of the intervening decision in *Payton*, this justification for application of the exclusionary rule does not exist. The continuing validity of *Cravero* is, at a minimum, called into question as a result of *Payton*, and it is by no means certain how the Fifth Circuit would decide the issue today. Indeed, if petitioner is correct about the implications of *Payton*, then the governing constitutional standard has already been established, and there is no need to invalidate petitioner's conviction in order to accomplish that end.

On the other hand, even if petitioner is incorrect about the significance of *Payton*, and a substantial

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[14] It is presumably for this reason that the Court in *Payton* did not embrace the State's argument that the challenged evidence should not be suppressed because it had been seized in good faith reliance on a state statute that authorized warrantless entries into a suspect's dwelling to effect an arrest supported by probable cause. See 78-5420 Br. for Appellee 81-91.

constitutional question regarding entries into third-party dwellings remains open after that decision, the Court can safely forgo *this* opportunity to answer that question without running any risk that the matter will indefinitely evade judicial review. *Payton* represents an important development in Fourth Amendment law. In choosing a vehicle in which to explore the legal ramifications of that development (and, by hypothesis, to apply the exclusionary rule if police behavior does not satisfy constitutional standards), the Court should await a case in which the kind of entry that occurred here is repeated after *Payton*. By following this procedure, the Court will be able effectively to resolve any remaining constitutional question and, at the same time, to achieve the salutary result of avoiding suppression of relevant evidence until presented with a case in which the police conduct occurred after this Court had already given notice that the rule of *Cravero* may no longer be good law.

Accordingly, unless the rule adopted in *Payton* is to be given retroactive effect, we believe that suppression of the challenged evidence is inappropriate in the instant case. We now turn, therefore, to the retroactivity question.

This Court's past decisions concerning the retroactivity of constitutional rules of criminal procedure establish that *Payton* should not be applied retroactively. In *Stovall* v. *Denno*, *supra*, 388 U.S. at 297, the Court identified three criteria that guide the resolution of retroactivity questions. They are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Application of these criteria demonstrates that *Payton* should not be given retroactive effect.

Payton involved application of the exclusionary rule. See 445 U.S. at 591-592. The principal purpose of the exclusionary rule is to deter unlawful police conduct. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). The rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" *Ibid.*, quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). See *United States* v. *Janis*, 428 U.S. 433, 443 (1976); *Desist* v. *United States*, 394 U.S. 244, 249 (1969). Rather, the rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). No possible deterrent purpose would be served in this case by giving retroactive effect to the decision in *Payton* and thus excluding the fruits of searches and seizures that the police did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. See *United States* v. *Peltier*, *supra*, 422 U.S. at 542; *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

Although the exclusionary rule also has been described as serving the imperative of judicial integrity, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the rule in a particular context. *Stone* v. *Powell*, *supra*, 428 U.S. at 485. The introduction at trial of highly probative evidence seized in the course of a search and seizure that violates the Fourth Amendment does not impair the truth-finding function of the criminal trial. "[T]here is no likelihood of unreliability or coercion present in a search-and-seizure case; the exclusionary rule is but a 'procedural weapon that has no bearing on guilt,' and 'the fairness of the trial is not under attack.'" *Desist*

v. *United States*, *supra*, 394 U.S. at 250, quoting from *Linkletter* v. *Walker*, *supra*, 381 U.S. at 638, 639. Thus, as the Court remarked in *United States* v. *Peltier*, *supra*, "the 'imperative of judicial integrity' is * * * not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." 422 U.S. at 537-538 (emphasis in original).

There is even less reason for retroactive application here than in other cases in which the Court has ruled that a new Fourth Amendment standard should be applied prospectively only. For example, in *Linkletter* v. *Walker*, *supra*, the Court refused to apply retroactively its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment's exclusionary rule was applicable in state criminal trials), despite the fact that the police in *Linkletter* (and in other pre-*Mapp* cases) could have entertained no doubts that their conduct was prohibited by the Fourth Amendment. See *United States* v. *Peltier*, *supra*, 422 U.S. at 538. Likewise, in *United States* v. *Peltier*, *supra*, the Court did not give retroactive effect to its decision in *Almeida-Sanchez* v. *United States*, *supra*, even though the search in *Peltier* (and in similar cases preceding *Almeida-Sanchez*) was conducted without either a warrant or probable cause. Here, in contrast, prior to the decision in *Payton* law enforcement officers who sought to arrest a person inside his home were required to have both probable cause to believe that the person had committed a crime and reason to believe that the person was inside the premises. The rule in *Payton* was not designed to deter either deliberate Fourth Amendment violations, as in *Mapp*, or the failure to

comply with the Amendment's probable cause requirement, as in *Almeida-Sanchez*. Rather, *Payton* simply imposed a warrant requirement upon officers whose actions in all other respects complied with the standards of the Fourth Amendment.

The second factor—the extent of reliance by law enforcement authorities on the old rule—also militates strongly in favor of applying *Payton* prospectively. While the Court prior to *Payton* had referred to the constitutionality of warrantless arrest entries as an open question, the decision in *Payton* referred to the practice as "longstanding" and "widespread" (445 U.S. at 600) and specifically acknowledged that "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances." *Id.* at 598. There is thus no reason to doubt that before *Payton* officers in a substantial number of jurisdictions conducted warrantless entries to arrest in justifiable reliance on then-prevailing statutory or constitutional norms.

Finally, the third factor—the burden on the administration of justice that would flow from retroactive application—also supports the conclusion that *Payton* should not be given full retroactive application. Because the practice was "longstanding" and "widespread," it is safe to assume that a large number of convictions resulting from seizures of incriminating evidence made in the course of warrantless entries to arrest would have to be set aside if *Payton* were applied retroactively.[15] Moreover, reversal would be required in these cases despite the fact that the exclusion of reliable evidence will impair rather

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[15] Even if relatively few convictions would be affected by retroactive application of *Payton*, the deterrent purpose of the *Payton* rule is itself sufficient to compel nonretroactivity. See *Desist* v. *United States*, *supra*, 394 U.S. at 251-252.

than aid the truth-finding process. See *Stone* v. *Powell, supra,* 428 U.S. at 490-491; *United States* v. *Janis, supra,* 428 U.S. at 448-449.

In *United States* v. *Corcione,* 592 F.2d 111, 118 (2d Cir.), cert. denied, 440 U.S. 975 (1979), the Second Circuit refused to apply retroactively its decision in *United States* v. *Reed,* 572 F.2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978), which had anticipated this Court's decision in *Payton.*[16] See also *People* v. *Ramey,* 16 Cal.3d 263, 276 n.7, 545 P.2d 1333, 1341 n.7, 127 Cal. Rptr. 629, 637 n.7, cert denied, 429 U.S. 929 (1976). The court in *Corcione* noted that it was unnecessary to decide whether *Reed* was distinguishable on its facts,[17] since it concluded that the deterrent purpose of the exclusionary rule would not be served "where police officers obtained the evidence in good faith prior to the announcement of the new constitutional principle." 592 F.2d at 118.[18]

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[16] *Reed* was cited approvingly by this Court in *Payton.* 445 U.S. at 588-589.

[17] The defendant in *Corcione* had been arrested on a landing outside his own apartment but inside a two-family house owned by another individual. 592 F.2d at 114, 118.

[18] In *United States* v. *Blake,* No. 79-1078 (9th Cir. Aug. 7, 1980), the Ninth Circuit held that its prior decision in *United States* v. *Prescott,* 581 F.2d 1343 (9th Cir. 1978), should be applied retroactively. *Prescott* had held that, absent exigent circumstances, police must obtain a warrant before entering a dwelling to arrest a suspect. 581 F.2d at 1350. The court in *Blake* based its retroactivity holding solely on the conclusion that the decision in *Prescott* had been "clearly foreshadowed" by earlier Ninth Circuit decisions, and found it unnecessary to decide or comment upon the possible retroactivity of *Payton. United States* v. *Blake, supra,* slip op. 4591-4592. In a subsequent decision, *United States* v. *Johnson,* No. 77-3808 (9th Cir. Sept. 2, 1980), the Ninth Circuit, without discussing the retroactivity question, applied the principles announced in *Payton* to suppress evidence obtained in the course of a warrantless pre-*Payton* entry of a suspect's dwelling. The government has filed a petition for rehearing en banc raising the retroactivity issue, and that petition is still pending.

In this case, the DEA agents acted in good faith reliance on prevailing Fifth Circuit precedent and had no reason to conform their actions to rules that would not be laid down until this Court's decision two years later in *Payton*. Until law enforcement officers may be charged with knowledge of the *Payton* decision, the exclusionary rule should not be applied automatically to suppress evidence seized in the course of warrantless entries into a home to execute an arrest, so long as the police had probable cause to believe that the suspect committed a felony and reason to believe that he was inside the premises.

III. THE FOURTH AMENDMENT DOES NOT REQUIRE LAW ENFORCEMENT OFFICERS TO OBTAIN A SEARCH WARRANT PRIOR TO ENTERING THE RESIDENCE OF A THIRD PARTY IN ORDER TO EXECUTE AN ARREST WARRANT FOR A FUGITIVE WHOM THE OFFICERS HAVE REASON TO BELIEVE IS PRESENT

This Court in *Payton* recognized that police entries into the home for the purpose of making an arrest, like entries to search for contraband or evidence of crime, involve a substantial invasion of the individual's interest in the privacy of his dwelling. Accordingly, the Court held that, in the absence of exigent circumstances or consent, the Fourth Amendment requires the police to obtain a warrant before entering a house for the purpose of effecting an arrest. The Court, however, expressly rejected the suggestion that the Constitution requires "a search warrant based on probable cause to believe the suspect is at home at a given time." 445 U.S. at 602. While acknowledging that "an arrest warrant requirement may afford less protection than a search warrant requirement," the Court nevertheless explained that an arrest warrant requirement is sufficient for Fourth Amendment purposes because it interposes "the magistrate's determi-

nation of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-603.

Under *Payton*, therefore, an arrest warrant implicitly authorizes the police "to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. The question presented in this case is whether a different rule should apply—*i.e.*, whether a search warrant should be required—when the person sought by the police and named in an arrest warrant is believed to be on the premises of a "third party" not named in the warrant. This question is one on which the lower courts have divided, both before and after *Payton*.[19]

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[19] Five circuits have taken the position that the police may enter a third party's residence to execute an arrest warrant, so long as they have probable cause to believe that the suspect is on the premises. See *United States* v. *Manley*, No. 79-1428 (2d Cir. Sept. 15, 1980), slip op. 5580 (dictum), petition for cert. pending *sub nom. Williams* v. *United States*, No. 80-762; *United States* v. *Craver*, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100, 430 U.S. 983 (1977); *United States* v. *James*, 528 F.2d 999, 1017 (5th Cir.), cert. denied, 429 U.S. 959 (1976); *Rodriguez* v. *Jones*, 473 F.2d 599, 605-606 (5th Cir.), cert. denied, 412 U.S. 953 (1973); *United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967); *United States* v. *Harper*, 550 F.2d 610, 613-614 (10th Cir.), cert. denied, 434 U.S. 837 (1977); *United States* v. *Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972); but cf. *United States* v. *Ford*, 553 F.2d 146, 159 n.45 (D.C. Cir. 1977) (dictum). Three courts of appeals appear to require a search warrant, except when exigent circumstances are present. See *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *Fisher* v. *Volz*, 496 F.2d 333, 338-343 (3d Cir. 1974); *Wallace* v. *King*, 626 F.2d 1157 (4th Cir. 1980), petition for cert. pending, No. 80-503; *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978) (without distinguishing between arrests inside the suspect's home or inside the home of a third party, the court held that the warrant must describe the place to be searched). Two other

Petitioner argues that the existence of an arrest warrant indicates only that the suspect has committed a crime, and that unless the magistrate also determines that there is probable cause to believe that the suspect is present in a third party's residence there is an insufficient basis for intruding upon the substantial interest of that person in the privacy of his own home. Law enforcement officers ordinarily cannot enter a private place to search for things until a magistrate has issued a search warrant based on probable cause to believe not only that a crime has been committed but also that fruits, instrumentalities, or evidence of the crime will be found at the place to be searched. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 554-559 (1978). Moreover, in *Payton* the Court concluded that entries into private premises to arrest

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courts have left the question open. *United States* v. *Adams*, 621 F.2d 41, 44 n.7 (1st Cir. 1980); *Rice* v. *Wolff*, 513 F.2d 1280, 1291-1292 n.7 (8th Cir. 1975), rev'd on other grounds *sub nom. Stone* v. *Powell*, 428 U.S. 465 (1976).

Several state court decisions uphold the power of the police to enter a third party's residence on the authority of an arrest warrant. See *State* v. *Jordan*, 288 Or. 391, 605 P.2d 646, 648-651 (1980); *Hocker* v. *Woody*, 26 Wash. App. 393, 613 P.2d 1183, 1186-1187 (1980); *Sanderson* v. *Superior Court of Stanislaus City*, 105 Cal. App. 3d 264, 164 Cal. Rptr. 290, 294 (1980); *Commonwealth* v. *Stanley*, 401 A.2d 1166, 1177 (Pa. Super. 1979); *Norman* v. *State*, 302 So.2d 254, 260 (Miss. 1974), cert. denied, 421 U.S. 966 (1975). Contra, *England* v. *State*, 488 P.2d 1347 (Okla. Ct. Crim. App. 1971) (court held that search warrant was required, but did not specify whether requirement was imposed by the Fourth Amendment or by state law).

The commentators are also divided on the question. See Mascolo, *Arrest Warrants and Search Warrants: The Seizure of A Suspect in the Home of a Third Party*, 54 Conn. B.J. 299 (1980); 2 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* 384-385 (1978). See also Note, *The Constitutionality of Warrantless Home Arrests*, 78 Colum. L. Rev. 1550, 1566 n.110 (1978); Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 Ohio St. L.J. 56, 67-71 (1974); Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan. L. Rev. 995, 997-999 (1971).

an individual and entries to search for property both intrude upon the individual's right to privacy in his home. If a search warrant is needed before the police may enter a person's home to search for things, it arguably should be required to enter a person's home to search for a fugitive.

This argument is apparently logical, it finds some support in the Fourth Amendment policy considerations that were invoked to justify the decision in *Payton*, and it has the virtue of producing symmetry between the law of entry to conduct a search for things to be seized and the law of entry to conduct a search for persons to be seized. Cf. *United States* v. *Watson*, 423 U.S. 411, 427-430 (1976) (Powell, J., concurring). But we submit that the argument is not without its flaws. For one thing, it is contrary to historical precedent, and, for another, it ignores the differences between persons and "things" and the considerable practical difficulties that a search warrant requirement would entail.

A. At Common Law, A Constable Was Authorized To Enter A Third Party's Dwelling To Execute An Arrest Warrant

As the Court noted in *Payton*, "examination of the common-law understanding of an officer's authority to arrest sheds light on * * * what the Framers of the [Fourth] Amendment might have thought to be reasonable." 445 U.S. at 591. After surveying the common law authorities, the Court in *Payton* concluded that the commentators were in sharp disagreement on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony. *Id.* at 592-596. There was no such divergence of views, however, with respect to the authority of the constable to enter any house in order to execute an arrest warrant. See

Mascolo, *Arrest Warrants and Search Warrants: The Seizure of A Suspect in the Home of A Third Party*, 54 Conn. B.J. 299, 304-306 (1980); Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 801-802 (1924).

"Concealment of crime has been condemned throughout our history." *Roberts* v. *United States*, 445 U.S. 552, 557 (1980). The common law recognized the citizen's affirmative duty "to raise the 'hue and cry' and report felonies to the authorities." *Branzburg* v. *Hayes*, 408 U.S. 665, 696 (1972).[20] In addition, citizens were required, upon demand, to assist the constable in the apprehension of a felon. 1 M. Hale, *Pleas of the Crown* 588 (1736); 2 W. Hawkins, *Pleas of the Crown* 116 (6th ed. 1787).[21]

In light of the strong public interest in the apprehension of felons, the common law—while sensitive to the individual's interest in maintaining the privacy of his home—permitted law officers to intrude upon that privacy interest when executing a warrant to arrest a suspect for a felony, so long as they had reason to believe that the person named in the warrant was present on the premises See *Kelsy* v. *Wright*, 1 Root 83, 84 (Conn. 1783). In *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603), the Kings Bench, while acknowledging that "the house of everyone is to him as his castle and fortress" (5 Co. Rep. at 91a, 77 Eng. Rep. at 195), concluded:

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[20] That duty is still recognized today. See 18 U.S.C. 4 (misprision of felony).

[21] This requirement has been codified in some states. *E.g.*, Ga. Code Ann. § 27-206 (1978) ("Every officer is bound to execute the penal warrants placed in his hands, and to that end, he may summon to his assistance, either in writing or verbally, any of the citizens of the neighborhood or county. As a posse of such officer, their acts shall be subject to the same protection and consequences as official acts.").

> [T]he house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases after denial on request made, the sheriff may break the house.

5 Co. Rep. at 93a, 77 Eng. Rep. at 198. See also *Johnson* v. *Leigh*, 6 Taunt. Rep. 246, 248 (C.P. 1815); *Sheers* v. *Brooks*, 2 H. Black. Rep. 120, 122 (C.P. 1792).

The common law commentators appear to have agreed that an officer executing an arrest warrant for a fugitive could forcibly break open the doors of any house after giving notice of his authority and purpose and demanding entry. While Coke took the position that a warrant issued by a justice of the peace on bare surmise could not authorize the breaking of doors of any person's house to effect an arrest, he expressed the view that in executing the King's writ after the return of an indictment, the sheriff "may demand the party indicted to be delivered; and that not done, he may break open the house, &c. and apprehend the felon * * *." 4 E. Coke, *Institutes* 177 (1764). See 2 W. Hawkins, *supra*, at 138. Hale was of the opinion that even if the suspect had not been indicted, the officer executing an arrest warrant for a felony "may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to

open the door * * *." 1 M. Hale, *supra*, at 581. See also 4 W. Blackstone, *Commentaries* 292.[22]

In sum, while " 'the freedom of one's house' was one of the most vital elements of English liberty" (*Payton* v. *New York*, *supra*, 445 U.S. at 597; footnote omitted), the home "was never perceived at the common law as a privileged sanctuary for suspected felons so as to defeat or obstruct the execution of the crown's process." Mascolo, *supra*, 54 Conn. B.J. at 305-306. In view of this historical background, it seems unlikely that the Framers intended to invalidate the settled authority of law officers to enter private premises, including those of a third party, in order to execute an arrest warrant for a felon.

B. There Are Significant Differences Between Persons And Things And Substantial Practical Difficulties In Imposing A Search Warrant Requirement On Officers Seeking To Execute An Arrest Warrant On The Premises Of A Third Party

Relying on *Payton*, petitioner argues (Pet. Br. 14, 18, 28-29, 32-36) that while an arrest warrant coupled with reason to believe that the suspect is present is sufficient to authorize entry into a suspect's home to arrest him, something more—*i.e.*, a search warrant—is needed to justify an entry into someone else's dwelling for the purpose of effecting an arrest. We do not doubt that the decision in *Payton* has substantially altered the law governing arrest

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[22] Blackstone noted that "[a] *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion." 4 W. Blackstone, *supra*, at 291 (emphasis in original). While the person to be seized had to be named in the arrest warrant, there was no requirement that the place or places to be searched for the suspect had to be particularly described.

entries and therefore shed important new light on the issue in the present case—indeed, that is the burden of our argument in the preceding section of this brief. *Payton* does not, however, conclusively resolve the present issue.

We note initially that the government's interest in apprehending felons is the same, regardless whether the felon is present at his own or another person's house. In addition, although the intrusion that accompanies an arrest entry is not to be minimized, an arrest warrant requirement provides some of the same protections to the homeowner's privacy interests that a search warrant requirement would.[23] Indeed, the Court recognized as much in *Payton*.

Most importantly, "[a]n arrest warrant is validly issued only when a magistrate is convinced that there is probable cause to believe that the named party has committed an offense." *United States* v. *McKinney*, 379 F.2d 259, 263 (6th Cir. 1967). Thus, an arrest warrant requirement interposes "the magistrate's determination of probable cause between the zealous officer and the citizen." *Payton* v. *New York*, *supra*, 445 U.S. at 602.

Moreover, the existence of an arrest warrant assures the occupants that the officer is present on offi-

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[23] We note that Rule 41(b)(4) of the Federal Rules of Criminal Procedure provides for the issuance of a warrant to search for and seize "any * * * person for whose arrest there is probable cause * * *." This provision does not reflect a belief that a search warrant is constitutionally required to arrest a suspect in a private place. The Advisory Committee noted that some circuits require a search warrant in particular circumstances, and that the law is in a sufficient state of uncertainty to justify an express provision permitting the issuance of a search warrant for persons subject to arrest on probable cause. Although the ALI *Model Code of Pre-Arraignment Procedure* § 210.3(1)(d) (Proposed Official Draft 1975) contains a similar provision, the Commentators explicitly rejected the position that the provision was required by the Fourth Amendment. *Id.* at 506-507.

cial business. And, by specifying the person to be arrested, the warrant indicates that the officer has legitimate reason to inquire whether the person named in the warrant is inside the premises. Cf. *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967). If the suspect is in fact inside, he may voluntarily surrender at the door, in which case no search of the premises will be necessary. See *Payton* v. *New York*, *supra*, 445 U.S. at 617 (White, J., dissenting).

Unlike a search warrant, an arrest warrant merely names the person to be seized but does not specify the premises to be searched. Thus, an arrest warrant requirement does not provide for a pre-entry determination by the magistrate that there is reason to believe that the suspect is present inside the premises to which entry is sought. That determination is left to the officer executing the arrest warrant. The officer's determination of reason to believe is, however, subject to subsequent judicial review. Cf. *Dalia* v. *United States*, 441 U.S. 238, 258 (1979). If the officer does not have sufficient reason to believe that the suspect is present at the time he enters the premises of a third party, any evidentiary fruits of that entry will be suppressed from use at trial against anyone with a legitimate expectation of privacy in the premises. In addition, if the officer violates the Fourth Amendment rights of the occupants by entering without reason to believe that the named suspect is present, he may be subject to a cause of action in damages for that violation. See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). A post-entry judicial exploration of the officer's reason to believe—like the similar post-entry remedies in *Dalia* and *Payton*—goes far toward protecting the third party's privacy interests.

While the protections afforded by an arrest warrant are substantial, we recognize that several considerations exist that could justify requiring a search warrant to seek a felon in another person's home, while not requiring such a warrant to search for him at his own home: (1) there is such an inherently greater likelihood that the suspect will be found at his own home than at another's that a magistrate's determination is unnecessary in the former but arguably is needed in the latter situation; (2) the potential for abuse is much less if the implicit entry authorization of an arrest warrant is confined to the suspect's own residence and is not held to make the police free to search for the suspect in anyone else's house without obtaining a particularized judicial determination that the suspect is present; and (3) an arrest warrant may be thought to have some of the undesirable attributes of a general warrant if it authorizes entry into third party premises, but it obviously presents no such problem in the case of the suspect's own premises.

We acknowledge that the interposition of a magistrate to make the determination of the suspect's presence may provide additional protection to the privacy interests of the occupants of third party premises. But the question remains whether the margin of difference is sufficiently significant to render unreasonable an entry of a third party's residence in the absence of a search warrant. The answer to this question, we believe, rests on the decision whether the increased margin of protection to privacy interests outweighs the practical handicaps to law enforcement that would be required to achieve that margin. Cf. *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979).

The principal practical problem that weighs against a search warrant requirement in the context of a search for a person is the inherent mobility of the suspect. See *United States* v. *McKinney*, *supra*, 379 F.2d at 263. It is settled that the police may enter any dwelling without any warrant when they are in hot pursuit of a suspect or when there are other exigent circumstances. *United States* v. *Santana*, 427 U.S. 38 (1976); *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc). But even where there is no specific exigency, it is often impractical to require that officers—having previously obtained an arrest warrant—return to the magistrate to demonstrate that they have reason to believe the suspect is within the premises of a third party.[24] People—particularly people suspected of crime—are mobile. A fugitive is likely to move as inconspicuously as possible and will rarely return home if he knows the police are looking for him and he desires to avoid apprehension.

Physical evidence does not move about with the same frequency that persons do, and it never moves about as a result of its own volition, instinct or suspicion. Moreover, criminals usually do not carry contraband or incriminating evidence on their person as a means of concealing those items from the police. In-

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[24] In theory, under petitioner's argument, only one warrant—a search warrant particularly describing the place to be searched—is necessary to authorize entry into third party premises to arrest a person whom the authorities have probable cause to believe committed a crime. See Fed. R. Crim. P. 41(b)(4). In practice, however, the police are likely to begin their search for the suspect at his own residence. Under *Payton*, they must secure an arrest warrant before entering the suspect's home. If he is not there, the police will then have to return to the magistrate for a new search warrant each time they receive information constituting reason to believe that the suspect is located at someone else's house.

stead, they are far more likely to conceal the goods at a particular location. See, *e.g.*, *United States* v *Rahn*, 511 F.2d 290, 293-294 (10th Cir.), cert. denied, 423 U.S. 825 (1975); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). The fact that a house appears to be momentarily unoccupied thus does not diminish the probable cause to believe that physical evidence will be found within.

In contrast, a search warrant for a fugitive may be an empty gesture because the information on which it is based may be stale at the time the warrant is issued, or shortly thereafter. Thus, a search warrant requirement may result in numerous futile trips to the magistrate, since each time the suspect changes his location the police will have to seek a new warrant. It may be that law enforcement officers could avert escapes by placing suspects under "house arrest" while a warrant is being sought, but that course, too, has its dangers. It might chill the rights of other persons inside the premises to move freely about. Further, upon learning of his "house arrest," the suspect could arm himself and endanger the lives of the officers when they eventually attempt to make the arrest.[25]

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[25] Of course, in those cases where the police can be assured that the suspect will remain at a particular location for a sufficiently lengthy period of time and that their physical safety will not be endangered by delaying entry, the burden of requiring them to obtain either a conventional or a telephonic search warrant is not great. See Fed. R. Crim. P. 41(c)(1) and (2). Indeed, the purpose of including a telephonic warrant provision in the Federal Rules of Criminal Procedure was to provide a means for federal law enforcement officers to procure a search warrant in the not infrequent situations "in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means." S. Rep. No. 95-354, 95th Cong., 1st Sess. 10-11 (1977).

Finally, apart from the problems posed by the inherent mobility of the suspect, there is one additional factor that militates against imposition of a search warrant requirement. It may be difficult, if not impossible, for the police to ascertain with any degree of certainty the relationship between the suspect and the premises where the suspect is believed to be located. Thus, the police may have highly reliable information that the suspect was seen entering a certain residence, but they may not know whether the suspect has been residing there for a considerable length of time, or whether he is merely visiting the residence for several minutes. If the suspect has been living at the premises, presumably an arrest warrant coupled with reason to believe that he is there will suffice to justify an entry, even though the premises are owned by a third party and others are living there. If the suspect is a mere visitor, under the rule petitioners urge the police would have to procure a search warrant prior to entry. Of course, if the suspect is merely visiting the premises, there is an increasing likelihood that he will no longer be there when the agents return from the magistrate with a search warrant. In any event, it is debatable whether the police should be placed in the position of having to guess at their peril whether the suspect has sufficient connection to the premises to justify entry armed only with an arrest warrant.

The crux of our argument is that the Fourth Amendment requires only that official actions be reasonable, and that arrest entries, as a class, should be presumptively reasonable if a magistrate has issued an arrest warrant on probable cause to believe that an individual has committed a crime, and the officers have good grounds to believe that the person named in the warrant is inside. It is possible that the police

may err in some cases in their determination of reason to believe that a suspect is within particular premises. While the issue is a close one, it seems to us that the possibility that some arrest entries will be unreasonable is not a sufficient justification for requiring search warrants prior to all arrest entries in third party dwellings, particularly in view of the extent to which a contrary ruling would depart from the historical understanding and the intentions of the Framers in adopting the Fourth Amendment.

Because of the crucial differences between people and things, we submit that if the Court does decide to impose a search warrant requirement for arrest entries into third party premises, it would be appropriate and necessary to recognize that the concept of exigent circumstances permitting entry without a search warrant may be different where the object of the search is a person than when it is simply a piece of tangible evidence. See *Warden* v. *Hayden*, *supra*, 387 U.S. at 298-300.

For example, if the police observe the delivery of a package that they know contains stolen property or narcotics to a particular address, they would—absent additional information suggesting that the evidence will disappear if they do not act quickly—be required to secure a search warrant in order to enter the premises and search for the package. But where the officers see a fugitive enter a residence, it may be reasonable for them to make an immediate arrest entry if they have no knowledge of the suspect's connection to the premises and no idea how long he is likely to remain there. Prompt action would be especially appropriate if, as in the present case, the subject of an arrest warrant is a fugitive who has been evading apprehension, if the officers believe him to be

armed, and if the offense for which he is being sought is a serious one.[26]

While the adoption of a more flexible standard of exigency with respect to fugitives might alleviate some of the difficulties encountered in making arrest entries at third party premises, we submit that these difficulties are likely to arise with sufficient frequency that the better course would be to hold that no search warrant is required provided an arrest warrant has been issued and the officers have reason to believe that the suspect is on the premises. The approach we urge is a clearer and simpler rule for law enforcement officers to apply. Moreover, it is consistent with the understanding of the Framers, and the arrest warrant itself provides substantial protection to the Fourth Amendment privacy interests that are implicated by such entries.

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[26] In *Dorman* v. *United States, supra,* the District of Columbia Circuit enumerated the following criteria as pertinent to a determination of exigent circumstances in making warrantless arrest entries: (1) the gravity of the offense; (2) whether the suspect is reasonably believed to be armed; (3) whether there is probable cause to believe the suspect committed the crime; (4) whether there is reason to believe the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is peaceable, or if force is used, whether the force was justified; and (7) the time of entry. 435 F.2d at 392-393. While we do not necessarily endorse the "check-list" approach suggested in *Dorman,* we agree with its recognition that different standards should govern the determination of exigency when the item sought is a person rather than a thing.

CONCLUSION

The judgment of the court of appeals should be affirmed; in the alternative, the Court may wish to remand the case for further proceedings with respect to petitioner's "standing" to raise the Fourth Amendment issue.

Respectfully submitted.

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DECEMBER 1980

APPENDIX *

Volume I—Suppression Hearing Transcript

[86] * * * * *

Q You were here in court on the 18th, you say, is that correct?

A Yes sir.

Q Magistrate's office was open, as far as you know? This Magistrate's office was open?

A As far as I know, yes.

Q You could have obtained a search warrant had you believed it necessary?

A Search warrant for what, sir?

Q For the search that you actually conducted, for going up to this place on Cary Court, this particular arrest. You could have gotten a search warrant. I'm saying it was physically possible to get it. Courts were open. You had the time, did you not?

A I don't know. A search warrant for what, sir? I had an arrest warrant.

Q I'm not, I don't want to quarrel with you on the law. I'm just asking physically, you had the opportunity had you believed it necessary, to obtain a search warrant to go up there to Cary Court looking for Ricky Lyons? You could have done it, could you not? You had the time, did you not? You [87] were at the place where you could have gotten it?

A Yes sir, I was here, yes sir, and I assume the Magistrate's office was open. But, I'm sorry, I don't understand the whole question.

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* The government designated this portion of the suppression hearing transcript for inclusion in the joint appendix. However, this item was omitted by counsel for petitioner, who was responsible for preparing the appendix in this case.

Q My question is, had you chosen to do so, you could have obtained a search warrant?

THE COURT: That's a legal question, too, Mr. Horn, as to whether he could or could not have obtained one. You really want to know if he had the opportunity to present the facts that he knew about to a magistrate?

MR. HORN: Right. I don't mean to foreclose probable cause.

BY MR. HORN:

Q I just mean physically, had you chosen to do so, you could have prepared the papers and attempted to get a search warrant to go look for Ricky Lyons at Cary Court. Had you chosen to do so, you could have done that, could you not?

A As far as I know, physically, yes sir.

Q There were no exigent circumstances?

A That's a long word. To the physical hindrance, no sir.

Q Did you have any information as to how long Ricky Lyons would be at this premises?

A No sir.

* * * * *

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FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 79-6777

GARY KEITH STEAGALD,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

GARY KEITH STEAGALD,	:	
Petitioner	:	
V.	:	NO. 79-6777
UNITED STATES OF AMERICA,	:	
Respondent	:	

REPLY BRIEF FOR PETITIONER

I. STANDING

The government has raised for the first time in the three year history of this litigation the issue of whether Petitioner had a reasonable expectation of privacy in the Cary Court premises where the search in question occurred. Petitioner's response thereto will be brief.

First, he contends that he did have such an expectation as the government itself contended in its Brief in Opposition at page 3, notwithstanding the new contention in the government's brief on the merits that such a conclusion was "mistakened". (Brief of the United States 17, n. 8)

Second, Petitioner believes that the standing argument was long ago waived by the government in the courts below and in its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit inasmuch as it was never raised.

To suggest that because the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960) was in force during the litigation below, the government never had an opportunity to raise the standing issue, flies in the face of the very decision upon which the government relies, to wit: United States v. Salvucci, No. 79-244 (June 25, 1980), decided nearly three months prior to the filing of the government's Brief in Opposition to the Petition for Writ of Certiorari. In Salvucci, supra, the government raised at the district

court level its contention that the the defendant therein had no legitimate expectation of privacy in the premises searched, and therefore, no standing to attack the validity of the search warrant pursuant to which the search was conducted. The government made its argument in Salvucci, despite the existence of Jones v. United States, supra, which Salvucci later, of course, overruled.

Of course, to make its most recent standing argument to the trial court, the government here would have had no little difficulty inasmuch as such an argument would have been rather inconsistent with its desire to connect Petitioner to the premises searched in order to prevail on the merits in its possession count of the indictment.

Petitioner contends that the government should not be permitted to profit by the absence of Salvucci in the trial on the merits, and the presence of Salvucci in this Court.

II. THE PAYTON NON-RETROACTIVITY ARGUMENT.

Petitioner must candidly concede that his argument on the merits in the Brief for Petitioner appears to urge a finding that the holding in Payton v. New York, 445 U.S. 573 (1980) be applied retroactively. This, however, is not his position. Instead, he believes that such a finding is unnecessary in order for him to prevail, but does contend that to the large extent to which Payton relied upon previous decisions of this Court, it is instructive. Petitioner contends that the clear language of the Fourth Amendment and the cases he cited in his first brief mandate the holding, independent of Payton, that the police must secure a search warrant before executing an arrest warrant at the residence of a citizen not named in the arrest warrant, and in the absence of exigent circumstances or consent. Otherwise, there is simply no way to protect the privacy of such citizens from the unfettered discretion of the government authorities.

III. THE "GOOD FAITH" ARGUMENT.

Assuming that the Constitution requires adherence to Petitioner's contentions, Petitioner is entitled to the benefit of this Court's decision, despite the Government's assertion that the agents' good faith belief in the constitutionality of their actions vitiated the later-determined constitutional violation.

As a matter of federal constitutional law, illegally obtained evidence must be excluded from the trial of a criminal defendant whose rights were transgressed during the search that resulted in acquisition of the evidence. Mapp v. Ohio, 367 U.S. 643 (1961); Stone v. Powell, 428 U.S. 465, 535 (1976) (Brennan, J., dissenting).

However, to apply the government's assertions regarding good faith of the searching officers to this case would both circumvent over sixty years of Fourth Amendment precedent, as well as freeze Fourth Amendment law in its present form by destroying the reason for criminal defendants to assert their rights.

In Stovall v. Denno, 388 U.S. 293 (1967), where it was held that the decisions in Wade v. United States, 388 U.S. 218 (1967) and Gilbert v. United States, 388 U.S. 263 (1967), would not be given retroactive effect, the Court discussed the apparent inequity among criminal litigants whose constitutional rights are at issue before the Supreme Court:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules establised in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of

> decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. 388 U.S. at 301 (emphasis supplied).

This has been cited affirmatively by this Court at least twice. United States v. Peltier, 422 U.S. 531, 542, n. 12 (1975); Bowen v. United States, 422 U.S. 916, 920 (1975).

The reasoning of Stovall is nowhere clearer or more applicable than in Petitioner's case. First, to deny Petitioner the benefit of the exclusionary rule for the constitutional violation as occurred here would mean that Petitioner had been deprived despite his use of the judicial system, undertaken pursuant to his good-faith and his correct interpretation of the Constitution. Michigan v. Defillippo, 443 U.S. 31, 99 S.Ct., at 2635, n. 1 (Brennan, J., dissenting). The need for a search warrant in cases such as this one would be mere advisory language to law enforcment officials until such time that it could be established that the officers in the field reasonably knew, or should have known, about this controlling "precedent" and its appropriate application.

Second, a ruling whose effect would be to deny a remedy to a criminal litigant similarly situated to petitioner would in fact bar appellate review of that class of cases. Once a constitutional violation is found by the trial court, followed by a finding of good-faith enforcement practice by the police, the matter is thereby closed. The government would not appeal, because the illegally seized evidence would be nontheless admitted. The accused's appellate rights are almost negligible,

since no alternative remedy is available in that criminal matter, and the burden of overcoming a trial court's factual finding of good faith nearly insurmountable.

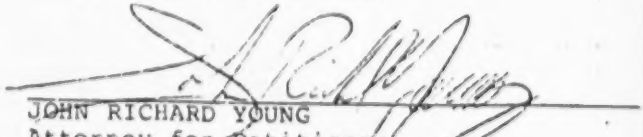
Thirdly, and paramount to this issue, is the severe effect that a denial of the decision's benefit to the criminal defendant who raised the issue would have upon all future criminal litigants. Outside of the illusory benefit of delay, it must be undisputed that a criminal defendant would not appeal to a reviewing court if he knows that, whether his contentions are proved right or wrong, the result is exactly the same. Not only does this render appellate decisions advisory, in that their holdings would apply only to subsequent cases, but it most certainly would demolish any incentive for an attorney to pursue such a costly and timely avenue merely to hit a definite deadend. Ironically, only those defendants with appointed counsel are likely to receive the determined, steady advocacy that flows from litigation more likely to produce "lawyers',"- but not "clients',"- victories.

Cases such as this one, encompassing both good faith and the issue of whether the litigant is to be benefitted by the decision in his case, raise the future issue as to when prospective application of the new doctrine would apply. Fourth Amendment cases are generally given prospective application only, with retroactivity gauged by Stovall v. Denno, supra. If Petitioner is denied the benefit of the new doctrine that his case created, then when is that holding deemed part of existing law enforcement practice? If it is determined to be the day of the decision, then would an officer in the field who, through no fault of his own, failed to receive the latest information (presumably from the police legal advisor) on permissible searches, be entitled to justify a constitutional violation due to good faith reliance upon the older, but actually overruled case

law? Is knowledge of the constitutional requirements imputed to the arresting or searching officer on the day after the decision? A week after? A month? To deny the benefit of the decision to the litigant who either perservered or was fortunate to have his case heard after other cases with identical facts is fraught with these difficulties. United States v. Peltier, supra, 422 U.S. at 543 (Douglas, J., Dissenting).

In some cases, "society's interests may be outweighed by the need to provide an effective sanction to a constitutional right". Michigan v. Tucker, 417 U.S. 433, 447 (1974), citing Weeks v. United States, 232 U.S. 383 (1914). The application of the good faith doctrine to this case will destroy the incentive of criminal defendants to vindicate infringements upon their Fourth Amendment rights. Clearly, the consequences of such an effect would be to stagnate an area of the law that until now had remained sufficiently flexible to meet the needs of our changing democratic society.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this date served the opposing counsel, Mr. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 30530, with a copy of the within and foregoing Reply Brief for Petitioner, by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to insure delivery.

This the 5th day of January, 1981.

JOHN RICHARD YOUNG
Attorney for Petitioner

No. 79-6777

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GARY KEITH STEAGALD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ELDRED WALLACE, JEANNIE WALLACE, JOHN DeBIASE AND ELIZABETH DeBIASE, IN SUPPORT OF PETITIONER, *AMICI CURIAE*

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No. 79-6777

IN THE

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OCTOBER TERM, 1980

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ELDRED WALLACE, JEANNIE WALLACE, JOHN DeBIASE AND ELIZABETH DeBIASE, IN SUPPORT OF PETITIONER, *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonprofit organization of over 200,000 persons, dedicated to defending and protecting the rights enumerated in the Constitution. The ACLU has had a special interest in

maintaining the fundamental protection offered to individuals by the Fourth Amendment against government intrusion into their homes. ACLU attorneys have appeared in this Court, either directly or for *amici,* in many of this Court's Fourth Amendment cases.

Against the arguments of those who contend that police officers should have broad discretion in determining when the privacy rights of citizens are to yield, the ACLU has long argued that the warrant requirement of the Fourth Amendment is the only meaningful safeguard for the citizen's right of privacy. We believe that the ACLU's experience in Fourth Amendment cases can be of substantial assistance to the Court as it decides whether the requirements of the Amendment were followed in this case.

Eldred and Jeannie Wallace and John and Elizabeth DeBiase are the respondents in *King v. Wallace,* No. 80-503, currently pending in this Court on petition for writ of certiorari. Counsel for *Amici Curiae* here is counsel of record for respondents in that case. The question presented in *King v. Wallace* is identical to the question presented here. Respondents Wallace and DeBiase, in a motion filed concurrently with their brief, have requested that the Court consolidate *King v. Wallace* with this case for all further proceedings. To date, the Court has not acted on their motion.

The Wallaces and DeBiases are homeowners in Fairfax County, Virginia, whose houses were searched under a police policy identical to the one which is the subject of this case. Their claims against the police officers were asserted, however, not in the course of a criminal prosecution -- no contraband or illegal activity was discovered in respondents' homes -- but in a civil rights suit against the Fairfax County Police Department. Any decision in this case should take into account and protect the Fourth Amendment privacy rights of similarly situated, uninvolved third parties who may be subjected to searches such as the one here.

SUMMARY OF ARGUMENT

The Framers of the Fourth Amendment wished to secure to the citizen the right of privacy in his home; their means to that end was the institution of the search warrant, which interposed the judiciary between the citizen and arbitrary police power. The federal agents in this case insist upon a distinction, for Fourth Amendment purposes, between searching for things and searching for persons in a house, arguing that in the latter category of cases, when in possession of an arrest warrant, they need not obtain a search warrant describing the premises to be entered in search of their suspect. This distinction makes no sense, however, for two reasons.

First, the invasion of the privacy of a citizen's home is unaffected by the object of the policeman's search. Second, the Fourth Amendment preference for judicial rather than police determinations of probable cause for searches is no less forceful because the intended search is for persons rather than things. The Fourth Amendment requires that, absent exigent circumstances, a search of particular premises must be based upon the determination of a judge or magistrate that there is probable cause to believe that the object of the search -- whether "person" or "thing" -- is within the premises to be entered. Only in the course of such a determination can the privacy of citizens in their homes be appropriately weighed against the interest of the government in seizing evidence or apprehending suspects.

ARGUMENT

THE FOURTH AMENDMENT REQUIRES THAT POLICE OFFICERS OBTAIN A WARRANT DESCRIBING THE PLACE TO BE SEARCHED BEFORE ENTERING AND SEARCHING THE PRIVATE HOME OF A THIRD PARTY IN AN ATTEMPT TO EXECUTE AN ARREST WARRANT, EVEN WHERE THE OFFICERS HAVE PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT NAMED IN THE WARRANT IS IN THE PREMISES, ABSENT CONSENT OF THE HOMEOWNER OR EXIGENT CIRCUMSTANCES.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment by its terms prohibits "unreasonable searches" and does not specify when search warrants must be obtained. Nevertheless, it is settled doctrine that the Amendment requires a policeman to obtain a warrant "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched" before he may enter a private dwelling and seize a "thing". *Agnello v. United States,* 269 U.S. 20, 33 (1925); *Jones v. United States,* 357 U.S. 493, 497 (1958). The issue presented by this case is whether an officer must also obtain a warrant "particularly describing the place to be searched" before entering a third party's home for a search aimed at the seizure of a "person" named in an arrest warrant.

This Court has never decided this issue. In 1958, the Court characterized it as a "grave" constitutional question, but refused to rule on it because it was not fairly presented on a record which was interpreted as involving a search for goods. *Jones v. United States, supra,* at 499-500. Since that time, the question has surfaced but it has never been directly confronted.[1] This case presents the issue simply and squarely.

The Federal narcotics agents in this case perceived and acted upon a distinction between searching for people and searching for objects in a house, although their basis for differentiating between the two types of searches does not appear in the record.[2] Consistent with that distinction, they searched the residence of third parties for their suspect, Ricky Lyons, on the basis of an outstanding warrant for his arrest, but applied to a magistrate for a search warrant specifically describing the premises in order to seize packets of suspected cocaine discovered in the course of their search for Lyons.

Amici submit that there is no rational ground consistent with the purposes of the Fourth Amendment for a rule permitting entries and searches for persons but not for tangible objects. The Amendment's terms do not differentiate between searches for persons and things, and the Amendment protects the security of citizens

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[1] *See* Payton v. New York, No. 78-5420, United States Supreme Court (April 15, 1980) (Slip Opinion at 10); United States v. Watson, 423 U.S. 411, 418, at n.6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113, at n.13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-481, *reh. denied,* 404 U.S. 874 (1971).

[2] It will be assumed, for purposes of this brief, that the agents were relying for their actions upon the rule enunciated in United States v. Cravero, infra.

in their "persons, homes, papers, and effects" without distinction.

Our position is firmly rooted in the principles of the Fourth Amendment.[3] The protection we seek is not founded upon some novel theory of jurisprudence which a more humane society might have incorporated into its Bill of Rights; rather, we invoke the very protection that the Framers of the Fourth Amendment intended to provide, namely, protection against general warrants which sanction wholesale invasions of private homes and subject the citizenry to a police system armed with unfettered discretion.

We start with the incontrovertible proposition that the basic policy of the Fourth Amendment is to secure to the citizen the right of privacy in his home. The landmark case of *Boyd v. United States,* 116 U.S. 616, 630 (1886), stated the point simply and forcefully:

> [The principles of the Fourth Amendment] apply to all invasions, on the part of the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.

It is clear, moreover, that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts. *See, e.g., United States v. Martinez-Fuerte,* 428 U.S. 543, 561, 565 (1976) ("the sanctity of

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[3]The fundamental protections of the Fourth Amendment are guaranteed by the Fourteenth Amendment against invasion by the states. Wolf v. Colorado, 338 U.S. 25, 27 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23, 33 (1963).

private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." "Private dwellings involve 'strong Fourth Amendment interests that justify the warrant requirement.'"); *South Dakota v. Opperman,* 428 U.S. 364, 367 (1975) ("Less rigorous warrant requirements govern [automobile searches] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." (Footnote omitted.)); *Silverman v. United States,* 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Coke, Third Institute 162 (1644) ("A man's house is his castle.").

The history of the Fourth Amendment supports the conclusion that its principal attack was against general warrants. That the Amendment was adopted in response to the abuses which had been committed by governmental authorities under general warrants has been documented repeatedly. *Boyd v. United States, supra,* at 624-625; *Frank v. Maryland,* 359 U.S. 350, 363-366, 376-377 (1959); *Marcus v. Search Warrant,* 367 U.S. 717, 714-729 (1061); *Stanford v. Texas,* 379 U.S. 476, 481-484 (1965). In *Stanford v. Texas, supra,* the Court, in discussing the origins and purpose of the Fourth Amendment, observed:

> Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law,

> that ever was found in an English lawbook, because they placed 'the liberty of every man in the hands of every petty officer.'" 379 U.S. at 481.

Although the American and English experiences with general warrants differed in some particulars, the essential vice of these warrants was seen to be the same–the blanket authority given to police officers by a single warrant to enter and search numberless homes, trampling the right of privacy of their inhabitants. It is our contention that the warrant for the arrest of Ricky Lyons had this same fatal characteristic.

The solution adopted by the Framers of the Bill of Rights to keep "the liberty of every man" out of "the hands of every petty officer" was the institution of the search warrant, which interposed the judiciary between the citizen and arbitrary police power. The rationale of the search warrant was stated plainly by Justice Douglas in *McDonald v. United States*, 335 U.S. 451, 455-456 (1948):

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizens and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing and history shows that the police acting on their own cannot be trusted. So the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to

> that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that exigencies of the situation made that course imperative.

The constitutional preference that determinations of probable cause for searches be conducted by disinterested judicial officers rather than by interested police officers was also articulated in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), in Justice Jackson's familiar words:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime....* When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[4] (Emphasis added.)

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[4] *See also,* United States v. Lefkowitz, 285 U.S. 452, 464 (1932): [T]he informed and deliberate determinations of magistrates empowered to issue warrants...are to be preferred over the hurried actions of police officers...who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

Today it is well settled that a search warrant is required for the search of a private home, subject to established exceptions.[5] The exceptions which this Court has enumerated in the past can generally be classified as involving the search of a moving vehicle, justified by its mobility. *See, e.g., Carroll v. United States,* 267 U.S. 132 (1925); search incident to arrest, justified in order to protect the officer or to prevent destruction of evidence immediately at hand. *See, e.g., Chimel v. California,* 395 U.S. 752 (1969); and an exception which the Court has recognized to date only in dictum for searches developing under extraordinary or "exceptional" circumstances. *See, e.g., Warden v. Hayden,* 387 U.S. 294 (1967); *Schmerber v. California,* 384 U.S. 757, 770-771 (1966); *see generally, Johnson v. United States, supra,* at 15.

While the police may urge this Court to support warrantless arrest entries under a standard of general reasonableness, the validity of the reasonableness test itself is extremely doubtful. *United States v. Rabinowitz,* 339 U.S. 56 (1950), in which that theory reaches its fullest development, has been only twice reaffirmed by the Supreme Court and was finally overruled in *Chimel v. California, supra,* at 768. *Chimel* is significant to the inquiry here for several reasons. The standard of necessity which the Court adopted there can be viewed as a general watershed for all exceptions to the warrant requirement. Noting that the Fourth Amendment's requirement of reasonableness must be read in light of its

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[5] Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Mancusi v. DeForte, 392 U.S. 364, 370 (1968); Katz v. United States, 389 U.S. 347, 357 (1967); Rios v. United States, 364 U.S. 253, 260 (1960); Jones v. United States, 357 U.S. 493, 499 (1958).

history and purpose, the Court, in overruling *Rabinowitz,* concluded "we cannot...excuse the absence of a search warrant without a showing by those who want exemption from the constitutional mandate that the exigencies of the situation made that course imperative." 395 U.S. at 761, citing *McDonald v. United States, supra.*[6]

Considerable precedent other than *Chimel* supports the proposition that necessity is the proper standard to use in determining whether circumstances are sufficiently extraordinary to permit an exception to the warrant requirement. This Court's past application of the notion of exceptional circumstances indicates that the key to excusing a warrant has been a finding that an immediate search was necessary. *See, e.g., Johnson v. United States, supra; McDonald v. United States, supra; United States v. Jeffers, supra.* In all three cases, the Court invalidated a warrantless search for want of exceptional circumstances.

In *Chambers v. Maroney,* 399 U.S. 42 (1970), this Court reemphasized that necessity is the proper standard to use in determining whether circumstances will permit an exception to the warrant requirement:

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule,

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[6]The burden here, of course, is upon the police to show the legality of their practice:

> [t]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking [an] exemption [from the requirement] to show the need for it...Chimel v. California, supra, at 762, quoting United States v. Jeffers, 342 U.S. 48, 51 (1951).

> it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. *Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization.* 399 U.S. at 51. (Emphasis added.)

Johnson, McDonald and *Jeffers* implicitly grounded the exigent circumstances exception, to the extent that it was recognized in those cases, on a finding that a warrantless search by police was imperative if the purpose of the search was not to be frustrated. These cases have been cited repeatedly by the Supreme Court as precedent for determining other exceptions to the warrant requirement. *See, e.g., Mancusi v. DeForte, supra; Katz v. United States, supra.* Moreover, in the only three cases in which the Court has excused a warrantless search, other than one incident to an arrest or of a moving vehicle, it emphasized the imperative nature of the search. *See, e.g., Terry v. Ohio,* 392 U.S. 1 (1968) ("'stop and frisk' for weapons"); *Warden v. Hayden, supra* (hot pursuit); *Schmerber v. California, supra* (compulsory blood test incident to arrest); *but cf. Sibron v. New York,* 392 U.S. 40, 62-66 (1968). Taken as a whole, these cases indicate that the constitutionality of warrantless arrest entries turns on whether they take place under circumstances of substantial necessity which preclude recourse to judicial channels.[7]

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[7] For a fuller discussion of this point, *see* Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349 (1974); Note, *The Neglected Fourth Amendment Problem in Arrest Entries,* 23 Stanford L. Rev. 994 (1971).

Recently, in *Payton v. New York*, No. 78-5420, United States Supreme Court (April 15, 1980) (Slip Opinion), the Court considered the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant of any kind to make a routine felony arrest. It held these statutes unconstitutional, and specified that an arrest warrant would be required, absent exigent circumstances, to enter the home of a suspect to seize him. Specifically not addressed in *Payton* was the issue presented here. Nevertheless, in reasoning to its conclusion, the Court presented an analysis of the purpose and development of the Fourth Amendment which leads inexorably to its conclusion in this case.

The Court noted at the outset that "the simple language of the Amendment applies equally to seizures of persons and to seizures of property." Slip Opinion at 12. It went on to observe that

> As the Court unanimously reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. Slip Opinion at 12.

After examining the development of the common law in respect to a constable's authority to make warrantless arrests, and after noting that

> The common law sources display sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repitition of the adage that a "man's house is his castle" was one of the most vital elements of English liberty. Slip Opinion at 23-24.

The Court concluded:

> If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe that the suspect is within. Slip Opinion at 29.

The holding in *Payton* was clearly grounded upon a view that evidence of a citizen's participation in a felony, sufficient to support the issuance of a warrant for his arrest, would outweigh that person's interest in maintaining the privacy of his *own* home, and that the search of *his* house is therefore reasonable within the meaning of the Fourth Amendment. But the authority of such a warrant is "limited". Evidence of a suspect's involvement in crime has, of course, no bearing on the reasonableness of an entry to search for him into the home of presumptively innocent third parties, whose privacy interests were never considered when the arrest warrant issued.

The United States Courts of Appeals for various circuits have expressed differing views on this issue. The Third, Fourth and District of Columbia Circuits have adopted the language and reasoning of *Chambers v. Maroney, supra,* in concluding that police officers may not, consistent with the Fourth Amendment, enter the home of third parties in search of a suspected offender for whom they have a valid arrest warrant, even where they have probable cause to believe that the suspect will be found on the premises, unless the search takes place under exigent circumstances.

In *Fisher v. Volz,* 496 F.2d 333 (3d Cir. 1974), the Court of Appeals addressed the issue which this case presents.

Initially, it is worth noting that *Fisher,* like *Wallace v. King, infra,* was a suit under 42 U.S.C. § 1983 against the Newark police, and not a criminal prosecution in which the Fourth Amendment issue was raised in the course of a motion to suppress evidence, as was the case in the decisions of most other Courts of Appeals considering this question. The court in Fisher reasoned as follows:

> *A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home. Permitting reliance by the officer solely on exigent circumstances offers too many opportunities for abuse, provides little comfort to a citizen peacefully in his home, and affords insufficient protection against invasions of his privacy.* A requirement that the officer must also have probable cause to believe that the suspect is in the dwelling will not unduly restrict the effectiveness of the police action but will reduce the obvious risks of abuse. 496 F.2d at 341. (Emphasis added.)

The Court held:

> [P]olice officers may not constitutionally enter the home of an innocent citizen in search of a suspected offender for whom they have a valid arrest warrant, even under exigent circumstances, unless they also have probable cause to believe the suspect will be found on the premises. 496 F.2d at 341-342.

See, also, Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied,* 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975).

In *United States v. Ford,* 553 F.2d 146 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit reviewed its opinions in the last decade dealing with this

question and clarified its policy in light of decisions which had been rendered in the intervening years by other Circuits. The Court in *Ford,* citing *Chambers v. Maroney, supra,* indicated that the D.C. Circuit has adopted essentially the same view of this issue as have the Third and Fourth Circuits: that is, that the Fourth Amendment requires both probable cause and exigent circumstances to justify a warrantless search of third party premises. *United States v. Ford, supra* at 159, n.45.

The latest Court of Appeals decision on this point is that of the Fourth Circuit in *Wallace v. King,* No. 78-1399 (July 1, 1980).[8] The Fourth Circuit's decision in *Wallace* was held in abeyance pending this Court's ruling in *Payton v. New York, supra,* and it is the only Circuit decision to take *Payton* into account. The Wallaces and their co-plaintiffs are homeowners in Fairfax County, Virginia, whose houses were searched by police seeking to apprehend a young woman who had failed to appear at a scheduled court hearing. In a relatively brief opinion, citing *Fisher v. Volz, supra,* and *Payton* for its authority, the court held that the defendant police officers could not, consistent with the Fourth Amendment, enter the home of third parties in search of a suspected offender for whom they had a valid arrest warrant, even though the officers had probable cause to believe that the suspect would be found in the premises, since the searches in question did not take place under exigent circumstances.

Other Circuits have approached this issue without directly ruling on it. All of the Courts of Appeals have agreed that, at a minimum, there must be probable cause to believe that a suspect for whom the police have a warrant is within a particular dwelling before the police may enter it to search. *See, e.g., Rice v. Wolff,* 513 F.2d 1280, 1291-1292

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[8] This case is currently on petition to this Court for writ of certiorari, as King v. Wallace, No. 80-503.

(8th Cir.), *reversed on other grounds, sub. nom., Stone v. Powell*, 428 U.S. 465 (1976). In that case, the Court found that the police did not have probable cause for their search and it did not reach the issue of urgent need.

Three Circuits have declared that something less than a showing of both probable cause and exigent circumstances can justify warrantless searches of third party premises. In *United States v. McKinney,* 379 F.2d 259 (6th Cir. 1967), in the context of a motion to suppress evidence, the Court held that probable cause to believe that a fugitive was in a third party's house authorized F.B.I. agents with an arrest warrant for the suspect to search the house for him. The Court in *McKinney* appears to have relied upon *United States v. Rabinowitz, supra,* in so holding. 379 F.2d at 263, n.3. As was pointed out above, *Rabinowitz* was overruled by *Chimel v. California, supra,* two years after the decision in *McKinney,* 395 U.S. at 768. Interestingly, in response to the defendant's argument in *McKinney* that exigent circumstances must also be shown, the Court there made the curious rejoinder in dictum that "there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant." 379 F.2d at 263. Whether that Court would so hold as a matter of law is not clear.

United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), upon which the Court of Appeals in this case relied for its ruling, involved a Justice Department prosecution of multiple defendants for conspiracy to import cocaine and marijuana.[9] The Court, in its initial decision (it rendered a second decision on rehearing), ruled with the

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[9] In United States v. Harper, 550 F.2d 610 (10th Cir. 1977), the Court of Appeals for the Tenth Circuit followed United States v. Cravero, infra, to hold that where federal drug enforcement agents had reasonable grounds to believe that a fugitive for whom an arrest warrant had been issued was staying at a certain address, those agents lawfully used the arrest warrant to gain entry to the residence.

Third and District of Columbia Circuits in holding that both probable cause and exigent circumstances were necessary to support a warrantless search of third party premises. In the course of its first opinion, the Court discussed the considerations which had led to this conclusion:

> A search warrant would be required, in the normal case and absent some exception, to enter a residence to search for a stolen pet or other object seen carried into it. *We are unable to see a distinction valid for Fourth Amendment purposes between entry to search for such an object and entry to apprehend a guest. Consequently, logic demands that the rules governing searches should apply with equal force to an arrest entry into a third party's home.* If the policeman has probable cause to believe that a suspect he wishes to arrest is inside the home, he can demonstrate this to a magistrate and obtain a search warrant for the suspect. If he fails to obtain a warrant, then an arrest entry without a search warrant will be permissible only if exigent circumstances or some other established exception to the warrant requirement obtains. Any other result raises the spectre of police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe that the suspect may be concealed. 545 F.2d at 415-416. (Footnotes omitted.) (Emphasis added.)

On a petition for rehearing, the Court reversed its earlier decision. 545 F.2d 420. The reason for its so doing–which is not entirely clear from the language of the second opinion–involves the panel's having "overlooked" prior law in the Fifth Circuit bearing on this issue, which held that where a police officer has a valid arrest warrant in his possession, and reasonably believes that its subject

is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect.[10]

The Fifth Circuit Court of Appeals in *Cravero*, in its second opinion in that case, and the Sixth Circuit in *McKinney*, failed to take into account the language and reasoning of this Court in *Chambers v. Maroney, supra,* and *Chimel v. California, supra,* upon which the opinions of the Third and District of Columbia Circuits are grounded. None of these courts had the benefit of this Court's decision in *Payton v. New York, supra.* It is important, in any event, to bear in mind that the precedents followed by the Court in *Cravero* employed the discredited "reasonableness" test of *United States v. Rabinowitz, supra,* as did the Court in *McKinney.*

The federal agents in this case have insisted upon a distinction, for Fourth Amendment purposes, between searching for things and searching for persons subject to arrest, and have urged that a search warrant is unnecessary in the latter class of cases. It is this contention which, *Amici* submit, is truly novel. There are two reasons why this purported distinction cannot be squared with the Fourth Amendment.

First, the invasion of the privacy of a citizen's home is unaffected by the object of the policeman's search. As this Court pointed out in *Payton v. New York, supra,* in responding to the observation of the New York Court of Appeals that a substantial difference exists in the relative obtrusiveness of an entry to search for property and an entry to search for a person:

> It is true that the area that may legally be searched is broader when executing a search

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[10] United States v. James, 528 F.2d 999 (5th Cir. 1976), and Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), *cert. denied,* 412 U.S. 953 (1973).

warrant than when executing an arrest warrant in the home. *See Chimel v. California, supra.* This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrests.

But the critical point is that any differences in the obtrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home–a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses ...shall not be violated." (Emphasis added.) Slip Opinion at 16.

When a homeowner is subjected to a warrantless search, it does not soothe his outrage nor lessen the gravity of the invasion of his privacy to know that the search is for a suspected misdemeanant rather than for some piece of property. The Fourth Amendment protects the citizen's right of privacy; an invasion of that right is not eased by the presentation of an arrest warrant for a stranger.

Second, the Fourth Amendment preference for judicial rather than police determinations of probable cause for searches of homes is no less forceful because the intended search is for persons rather than for things.[11] The

[11] As this Court pointed out in Coolidge v. New Hampshire, 403 U.S. 443 (1971), police entry into a home to effect an arrest is "a very substantial intrusion." 403 U.S. at 477.

requirement of a search warrant is no mere formality. It reflects the important Fourth Amendment policy that "the informed and deliberate determinations of magistrates empowered to issue warrants...are to be preferred over the hurried actions of police officers...." *United States v. Lefkowitz, supra,* at 464. The Fourth Amendment commands that judicial officers rather than police officers make the determination that there exists probable cause for the search of a particular home. In doing so, the Amendment neither makes nor supports a distinction between searches for persons and searches for objects.

Once it is grasped that the issuance of an arrest warrant is unrelated to any judicial determination that an accused is at a given place, it becomes evident that the legality of the search for the person named in the warrant is to be determined by established principles. An arrest warrant embodies a judicial determination that there exists probable cause for the arrest of the person named therein; it reflects no judgment whatsoever on the issue of where the suspect may be found. The determination of a judge or a magistrate that there is probable cause to arrest a particular individual does not satisfy the Fourth Amendment requirement that, absent exigent circumstances, a search of particular premises must be based upon the determination of a judge or magistrate that there is probable cause to believe that the object of the search is within the premises to be searched.

A rule such as the one advocated by defendants, which would dispense with the search warrant requirement, simply cautioning a police officer not to enter dwellings without probable cause, offers only illusory protection. The manner in which most police departments maintain records of their warrantless searches and seizures suggests that there are no records available to them comparable to the sworn statement of facts known to an officer

and asserted to justify that officer's belief that the object of his search is in a stated premises, such as would be required to obtain a search warrant. *See Aguilar v. Texas,* 378 U.S. 108 (1964). With no adequate record of the basis for the policeman's actions, there is scant likelihood that those actions could be reviewed effectively by a court, or even by the policeman's superior officers, were they so inclined. A rule such as the one the police advocate truly leaves the privacy of each citizen's home "in the hands of every petty officer."

A rule allowing warrantless searches for persons has, moreover, an enormous potential for abuse by police seeking to nullify the requirement of a warrant to search for goods. A rule such as this will surely tempt the police (and there is evidence in this case that the officers did so) to search for contraband under the guise of a search for a person. *Jones v. United States, supra,* involved just that problem, and the majority and dissenting opinions illustrate the difficulty courts will have in sorting out the officer's motives when police search without warrants naming the place to be searched. This rule also facilitates selective and discriminatory disregard of the probable cause standard, as for example, where the police consider the crime particularly heinous, or where the homes to be searched belong to less privileged citizens or to people who are politically unpopular. *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *Lankford v. Gelston,* 346 F.2d 197 (4th Cir. 1966).

The search warrant rule is not blind to the exigencies of day-to-day police practice. Exceptional circumstances, such as "hot pursuit", or actual sight of a felon in the premises, are recognized as justifying failure to obtain a search warrant. But mere delay or inconvenience to police officers has never excused the necessity of obtaining a search warrant. *Johnson v. United States, supra,* at 15.

If the basic policy of the Fourth Amendment is to be served, then the citizen's right of privacy in his home must be protected by a requirement that police officers obtain warrants, under oath and upon a showing of probable cause, "particularly describing the place to be searched" before entering the homes of presumptively innocent third parties. The Amendment literally specifies that this be done, and the reasoning of this Court's decisions supports such a conclusion. Dispensing with this requirement would bring into being precisely the relationship between citizens and their government that the Framers drafted the Amendment to avoid. "Zealous officers" engaged in "the often competitive enterprise of ferretting out crime," in Justice Jackson's words, could routinely decide without the intervention of any judicial officer when the privacy of a citizen's home is to be violated. A similar state of affairs led to the enactment of the Fourth Amendment, and if history and experience teach us anything, it is that the mistakes of the past should not be repeated.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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November 20, 1980